On March 30, 2005, by summary order, without an opinion, the court of appeals affirmed the district court substantially for the reasons articulated by the district court. App. 3a. By order entered June 22, 2005, the court of appeals denied rehearing and rehearing en banc. App. 132a.

REASONS FOR GRANTING THE PETITION

The decision below creates a conflict with the decisions of this Court and among the circuit courts of appeal as to whether actionable block-booking of films requires independent evidence that the participants in the block-booking arrangement were actually coerced into taking unwanted films. App. 20a, 3a. The decisions of this Court as well as of the Ninth and Eleventh Circuits presume such coercion when there is evidence of the block-booking of copyrighted films.[4]

This is also an important and frequently recurring issue since block-booking has been repeatedly addressed by the federal courts.[5]

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4 *United States v. Lowe's, Inc.*, 371 U.S. 38 (1962); *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *modified*, 1970 U.S. App. LEXIS 6185, *cert. denied*, 402 U.S. 923 (1971); and *MCA Television Ltd. V. Public Interest Corp.*, 171 F.3d 1265 (11th Cir. 1999).

5 *See, e.g., United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *United States v. Lowe's, Inc.*, 371 U.S. 38 (1962); *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *modified*, 1970 U.S. App. LEXIS 6185, *cert. denied*, 402 U.S. 923 (1971); *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656 (2d Cir. 1989); and *MCA Television Ltd. V. Public Interest Corp.*, 171 F.3d 1265 (11th Cir. 1999).

The Petition should also be granted in view of the Court's recent grant of review of the decision in *Independent Ink, Inc. v. Illinois Tool Works, Inc.*, 396 F.3d 1342 (Fed. Cir. 2005). *Independent Ink* poses the question of the significance of a patent in evaluating an alleged tying agreement. In view of this Court's review of the presumption of market power derived from a patent, it should also grant review of the instant case to consider the associated presumption of market power and coercion derived from both a copyright and the unique character and consumer appeal of feature films.

In addition, the decision below categorically rejects consumer injury arising from evidence that consumers were forced to see their first choice film at the second choice theater, or their second choice film at their first choice theater. The lower courts held that such consumer injury is not actionable under the antitrust laws. App. 3a, 24a. That decision clearly conflicts with the decision of the Seventh Circuit Court of Appeals.[6] This too is an important issue of antitrust jurisprudence that warrants resolution by this Court.

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF THE 9TH AND 11TH CIRCUIT COURTS OF APPEAL AS TO WHETHER BLOCK-BOOKING REQUIRES INDEPENDENT EVIDENCE OF ACTUAL "COERCION" IN ORDER TO VIOLATE SECTION 1 OF THE SHERMAN ACT.

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6 *Toys "R" Us, Inc. v. Federal Trade Commission*, 221 F.3d 928 (7th Cir. 2000).

Block-booking is a *per se* violation of section 1 of the Sherman Act. It takes place when a film distributor conditions an exhibitor's access to desired films on its agreeing to take less desired films or a block of films. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948). It is a form of tying in which the power to coerce is presumed due to the uniqueness and consumer appeal of the film and its copyright. The coercion arises from the conditioning of access to a film or group of films on the exhibitor taking another film or group of films.

This is not fundamentally different than the ruling in *Northern Pacific Railway v. United States*, 356 U.S. 1 (1958), finding the railroad's ownership of strategically located land near the tracks gave it "an effectual weapon to pressure buyers into taking the tied item." *Id.* at 6. All that is needed is "sufficient economic power to impose an appreciable restraint on free competition in the tied product." *Id.* at 11.

Block-booking has three recognized anticompetitive effects. First, it forecloses access by the excluded theatres to films of the distributors who insist on such conditioning arrangements. As this Court put it in *Paramount* (334 U.S. at 156-7), it "prevents competitors from bidding for single features on their individual merits." This is in effect a "tie-out," which is the anticompetitive harm Six West claims as to Sony. Second, it deprives the included theatres of access to films of other distributors. This is in effect a "tie-in," which is the anticompetitive harm Six West claims as to Loews' relationship licensing. Third, it forecloses other distributors from access to the included theatres.

The conduct at issue here is neither unlikely nor implausible. As Judge Edelstein pointed out, block-booking is "one of the most common practices used within the film industry to frustrate competition." App. 83a. One witness in

this case testified that "it's as common as telephone calls." Moreover, the economic incentive for a distributor to condition access to desired films on an exhibitor's agreement to take the block is ever present.

The trial court found, and the court of appeals affirmed, that there was no evidence, however, from which a reasonable jury could infer that Sony coerced any exhibitor to carry any films. There are two errors in this ruling. First, the ruling is based upon the view that something more than evidence of a block-booking arrangement is required – there must be independent evidence of "actual coercion." Second, the record evidence is fully sufficient for a jury to consider whether Sony engaged in block-booking arrangements with exhibitors.

a. The Need For Independent Proof of "Actual Coercion"

The most serious error of the lower courts' rulings is the requirement that even where there is evidence of a block-booking agreement, it cannot be actionable under section 1 of the Sherman Act without independent proof of "actual coercion." App. 20a, 3a. In view of the record evidence supporting a finding of block-booking, the lower courts' insistence on further evidence of coercion is inconsistent with *Paramount* and *Loews* and their progeny.

Coercion consists of the flexing of economic muscle. Economic muscle is present when the seller has "'appreciable economic power' in the tying product." *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 462 (1992). In the case of films, "[e]ven absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." *United States v. Loew's Inc.*, 371 U.S. 38, 45 and 45 n.4 (1962)

("the requisite economic power may be found on the basis of either uniqueness or consumer appeal"). Indeed, the Court held that beyond even these two considerations: "[W]hen the tying product is patented or copyrighted," as with feature films, "the sufficiency of economic power" necessary to coerce "is presumed." *Id.* at 45 n.4.

Unlawful coercion thus inheres in the conditioning of access to one copyrighted film on the exhibitor's agreement to take another. It is present whenever a "high quality film greatly desired is licensed only if an inferior one is taken." *Paramount*, 334 U.S. at 158. Whether "express or implied," such conditioning is unlawful. *Id.* at 159 (implied requirement that exhibitor purchase more than one film is illegal). The conditioning may involve a feature-for-feature, or a group of features for another group of features. *Id.* at 156.

The lower courts' demand for independent evidence of coercion squarely conflicts with this well-established antitrust law. It also conflicts with the decisions of at least two other courts of appeal.

In *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *modified*, 1970 U.S. App. LEXIS 6185, *cert. denied*, 402 U.S. 923 (1971), for example, the plaintiff had sold his interest in the film *Pride of the Yankees* to Samuel Goldwyn in exchange for a share of the film's revenues. He then alleged that Goldwyn engaged in block-booking which reduced the revenues derived from the licensing of his film. The court of appeals reversed the district court's dismissal of Mulvey's block-booking antitrust claim. The court held that there was a causal connection between the alleged block-booking and the claimed reduction in Mulvey's revenues from the licensing of *Pride of the Yankees* and that Mulvey had antitrust standing to challenge it. In so ruling, the court defined block-booking,

as this Court has done, as enabling "a distributor to obtain greater revenue from less desirable films by forcing an exhibitor who desires other films to take the entire package." 433 F.2d at 1076. The coercion inheres in the conditioning of access to certain films on the exhibitors taking the entire package.

In *MCA Television Ltd. v. Pubic Interest Corp.*, 171 F.3d 1265 (11th Cir. 1999), Public Interest Corp. ("PIC") counterclaimed against MCA for block-booking of the series *Harry and the Hendersons*. The district court found there was such illegal block-booking, but that PIC had not been harmed. The court of appeals reversed, finding that there was such block-booking and that PIC had been injured by it. In so ruling, the court looked not for independent evidence of coercion, but rather for evidence that "the terms of the contract for *Harry* reflect coercive use of MCA's copyright . . . ." *Id.* at 1279. So long as there was evidence that the exhibitor took films that it "did not wish," then there is *per se* illegal block-booking. "This is precisely the sort of anticompetitive effect the *per se* rule of Paramount and Loew's intended to protect against . . . ." *Id.*

Mulvey and *MCA* are squarely in conflict with the decisions below and this important issue of antitrust law warrants resolution.

Moreover, films are different from patents and reveal different characteristics of consumer desirability and uniqueness. Thus, whatever the Court may conclude about the presumption of market power in the case of a patented tying product, we respectfully urge the Court to grant review of this film block-booking case in conjunction with its review of the *Independent Ink* case in order to consider the unique characteristics of film block-booking. We note that the Motion Picture Association of America, Inc. has filed an amicus brief in *Independent Ink* urging reversal of *Loews* and

Paramount. This too supports the Court's grant of review of Six West's case in order to fully consider the application of the established block-booking doctrine to the film industry.

b. The Record Evidence

Finally, there is ample record evidence here to support a finding that Sony engaged in such block-booking. First, when Six West asked Sony for access to play particular Sony films, access was denied out-of-hand. App. 133a-134a. There was no bargaining over terms or price or length of play. Six West was denied access Sony films unless it took the entire block of films.

On January 15, 1996, Six West wrote to Mr. Reid at Sony Pictures Entertainment requesting access by the Twin Theatre to exhibit the Sony film *Sense and Sensibility*. In response, Mr. Reid wrote back with a statement of a general Sony policy that:

> this business does not work in such a way that we would only play "Sense and Sensibility," but that ***we would become obligated to play a full portion of the Sony Pictures release schedule***. App. 134a (emphasis added).

This is a classic demand for block-booking. Moreover, Mr. Reid testified that when Loews was wholly-owned by Sony, Loews would "take films that you would not otherwise take in order to preserve your ability to get other desirable films." He specifically testified that he had done this with Sony Pictures.

So, Mr. Reid's letter to Six West about being forced to take the "a full portion of the Sony Pictures release schedule" in order to gain access to one desired film was

supported by evidence that Sony had in fact done precisely this with Loews in other areas.

Second, Sony had made threats to other exhibitors that if they terminated a particular film Sony wanted them to keep showing, they would get no more Sony films.

The record contains an e-mail in the mid-1990's about the Sony film *Wolf*. It was from the Sony executive in charge of distributing films for Sony in New York City (Jim Amos) to the President of Distribution for Sony Pictures (Jeff Blake). Amos reports to the President that two theatre film buyers "were informed yesterday afternoon that we would no longer serve on avail their theatres that are terminating WOLF this week." The e-mail itself states that:

> ***In the past we have always threatened these accounts with being off-service***, only to have them reinstated when we were light on a particular picture. Just so you know, I intend to keep these theatres off service PERMANENTLY. When Nick comes looking for BLANKMAN next month (which will do well in many of his borough theatres), he will be turned down. Hopefully, ***this will indicate to the other smaller independents in New York that they must abide by the same guidelines as the majors if they wish to be taken on avail***. I will gladly sacrifice a couple of dates on my print count to guarantee that my New York track remains intact on the third and forth weeks. (emphasis added).

This evidence further substantiates that (1) Sony does employ threats to coerce exhibitors to run certain films they prefer not to run, (2) Sony will permanently refuse to deal with an exhibitor who does not succumb to these threats to

run particular films the exhibitor does not want to run, and (3) Sony has incorporated these threats and the linkage of the obligation to run certain films in order to get access to others into what it describes as "guidelines" to which all the major exhibitors had already succumbed.

Third, for more than nine years, Six West's Twin Theatre was unable to get access to a single Sony film, despite having specifically asked for them. In that east side zone of Manhattan, during that same period, Sony dealt with United Artists and Cineplex (1994-2002) which showed 99.5% of all the Sony (non-art) films shown in that zone. But Sony's block-booking agreements with United Artists and Cineplex in that zone had another anticompetitive effect: as Sony has admitted, ***nearly half of all the Sony films released during that 9 year period of time never even played in the east side zone***. Had Sony's arrangements with these two chains and others in that zone been open and competitive, consumers would have had access to far more film choices on the east side of Manhattan.

Finally, Sony and Loews had a financial incentive to mismanage the Twin and keep this pattern of block-booking in place. During most of this time, Sony owned 100% of Loews. In addition, Loews made 40 cents on the dollar at the Twin and 100 cents on the dollar at its other theatres. That explains why Sony and Loews were happy to let the Twin show 50% fewer films than at the other Loews theatres and why they were happy to keep in place Sony's block-booking practice in the east side which cut off the Twin from access to all Sony films.

This is evidence of what a number of lower courts have referred to as "[a]n unremitting policy of a tie-in." *See, e.g., Hill v. A-T-O Inc.*, 535 F.2d 1349, 1355 (2d Cir. 1976); *Reborn Enterprises Inc. v. Fine Child Inc.*, 590 F. Supp. 1423, 1446 (S.D.N.Y. 1984), *aff'd*, 754 F.2d 1072 (2d Cir.

1985); *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1131 (6th Cir. 1981). Sony conditioned access to certain films on exhibitors taking a block of their films and refused to deal with those who would not agree. Sony used threats and overt coercion to enforce its block-booking policies on exhibitors.

For these reasons, the decisions below are squarely in conflict with decisions of this Court and of the Ninth and Eleventh Circuit Courts of Appeal and present important issues of antitrust law which warrant review in conjunction with this Court's consideration of *Independent Ink*.

2. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE 7TH CIRCUIT COURT OF APPEALS OVER WHETHER FORCING CONSUMERS TO VIEW THEIR FIRST CHOICE FILM AT THEIR SECOND CHOICE THEATER, OR VICE VERSA, CONSTITUTES ACTIONABLE INJURY TO COMPETITION UNDER THE SECTION 1 OF THE SHERMAN ACT.

Six West's primary antitrust claim against the Loews entities was for illegal relationship licensing with other film distributors. While block-booking is *per se* illegal, the lower courts treated relationship licensing as governed by the Rule of Reason under Section 1 of the Sherman Act. App. 21a. As the lower courts explained it, "if a voluntary relationship between an exhibitor and distributor 'hinders other exhibitors' ability to acquire quality movies, then such relationship licensing would violate § 1.'" App. 20a-21a.

As a result, the lower courts required proof of "the exclusion of other exhibitors from fair access to films." App. 21a. Six West offered evidence that Loews' relationships with a number of distributors deprived its Twin Theatre of access to other films and thus forced Manhattan

movie goers to view their first choice films at their second choice theatres and vice versa.

The district court here held that such a reduction in consumer choice which forced Manhattan movie goers "to see his or her first choice movie at his or her second choice theatre or his or her second choice movie at his or her first choice theatre . . . is not an actionable restraint of trade." App. 24a. The Second Circuit Court of Appeals affirmed. App. 3a. This holding is squarely in conflict with the holding of the Seventh Circuit in *Toys "R" Us, Inc. v. Federal Trade Commission*, 221 F.3d 928 (7th Cir. 2000).

Lost access to movies is precisely why relationship licensing is illegal. *Paramount*, 334 U.S. at 156-57 ("prevents competitors from bidding for single features on their individual merits"); App. 21a. If the impact of these restrictions on competition were not "an actionable harm to consumer choice or competition," then *Paramount* and its progeny were all wrongly decided.

Moreover, consumers normally choose a film *and* a theater to suit their own taste and convenience. They want to see their movie in their choice of theater; otherwise they might as well stay home and watch a DVD. They also want to see films at theaters near their homes or their favorite restaurants. Restrictions which significantly interfere with this free choice have anticompetitive effects.

Because consumers care where they see their movies, the injury to consumer welfare here is analogous to, and even more evident than, that in *In re Toys "R" Us*, FTC Docket No. 9278, 1998 FTC LEXIS 185 (Oct. 14, 1998), *aff'd*, 221 F.3d 928 (7th Cir. 2000). There, Toys "R" Us sold about 20% of the toys in the U.S., and allegedly conspired with 10 toy manufacturers, who had "roughly 40% of all toy sales in the United States," not to sell the same toys to the

"warehouse clubs." *Toys "R" Us*, 1998 FTC LEXIS at *151. The FTC found that the anticompetitive effect was the "denial ... of consumers' preferences (as shoppers at the clubs) for a kind of service they preferred and that would have been provided but for [defendants'] intervention." *Id.* at *158. This harm was akin to that suffered in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 606 (1985) ("Skiers demonstrably preferred four mountains to three"). *See Toys "R" Us*, 1998 FTC LEXIS at *158.

As the FTC explained the competitive harm:

> The boycott orchestrated by TRU reduced the range of choices available to consumers and eliminated forms of competition that consumers desired and would have been able to enjoy absent TRU's policy. Club shoppers were not able to buy the products they wanted at the clubs. They either had to buy their second-choice goods ... at their first-choice stores (warehouse clubs) or their first-choice goods ... at their second-choice stores (TRU, Wal-Mart, Target). The Supreme Court has recognized similar restrictions on the forms of competition in the marketplace, and similar hindrances to products and services consumers desire, as anticompetitive effects cognizable under the antitrust laws. See the discussion of Aspen Ski and Indiana Fed'n of Dentists at pp. 75-76, supra. *Id.* at *183.

The boycott there involved toy makers who sold only "roughly 40%" of toys sold in the United States, not 100%, and did not affect discounters Wal-Mart and Target. *Id.* at *151, *183. Like consumers here, the warehouse clubs continued to have open access to alternative toy makers that

represented most of the toy market. *Id.* Yet, the Commission found this consumer injury sufficient under the antitrust laws.

On appeal, the Seventh Circuit Court of Appeals affirmed on all grounds and rejected appellate attacks on "the sufficiency of the evidence." 221 F.3d at 928. This conflict between the Seventh and Second Circuits on the significance of consumer choice under the antitrust laws raises an important issue of antitrust policy which warrants resolution by this Court.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed March 30, 2005]

04-2419

SIX WEST RETAIL ACQUISITION, INC.,
Plaintiff-Counter-Defendant-Appellant,

v.

SONY PICTURES ENTM'T CORP., ET AL.,
Defendants-Appellees,

TALENT BOOKING AGENCY, INC., ET AL.
Defendants-Counter-Claimants-Appellees,

SONY ELECS. CORP. & SONY THEATRE MGMT. CORP.
Defendants.

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED

CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 30th day of March, two thousand and five.

PRESENT:
Hon. John M. Walker, Jr.,
Chief Judge,
Hon. Thomas J. Meskill,
Hon. Dennis Jacobs,
Circuit Judges.

APPEARING FOR APPELLANT
JEFFREY H. HOWARD, Crowell & Moring LLP (Clifton S. Elgarten and Kent A. Gardiner, on the brief), Washington, DC

APPEARING FOR APPELLEES
GERSON A. ZWEIFACH, Williams & Connolly LLP (John E. Schmidtlein, Christopher N. Manning, Williams & Connolly LLP, Washington, DC; Fredric W. Yerman, Phillip A. Geraci, Kaye Scholer LLP, New York, NY, on the brief), Washington, DC, for Sony Appellees

ALEXANDER R. SUSSMAN, Fried, Frank, Harris, Shriver & Jacobson LLP (Brian J. Howard and Sima S. Ahuja, on the brief), New York, NY, for Loews Appellees

Appeal from the United States District Court for the Southern District of New York (Loretta A. Preska, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED that the judgment of the district court is **AFFIRMED.**

Six West Retail Acquisition, Inc. appeals from orders of the United States District Court for the Southern District of New York (Loretta A. Preska, Judge): (1) denying its motion for recusal under 28 U.S.C. § 455, Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp., No. 97 Civ. 5499, 2003 WL 282187 (S.D.N.Y. Feb. 7, 2003); (2) denying, by an endorsement dated February 14, 2003, its motion for leave to file an amended complaint; and (3) granting appellees' motions for summary judgment, Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp., No. 97 Civ. 5499, 2004 WL 691680 (S.D.N.Y. Mar. 31, 2004).

Substantially for the reasons stated in the district court's orders and opinions, we **AFFIRM.**

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/ Lucille Carr
Lucille Carr, Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 5499 (LAP)

SIX WEST RETAIL ACQUISITION, INC.,
Plaintiff,

v.

SONY THEATRE MANAGEMENT CORP., ET AL.,
Defendants.

DECIDED: March 30, 2004
FILED: March 31, 2004

2004 U.S. Dist. LEXIS 5411;
2004-1 Trade Cas. (CCH) P74,361

Before PRESKA, LORETTA A., United States District Judge.

PRIOR HISTORY: *Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp., 2003 U.S. Dist. LEXIS 1764 (S.D.N.Y., Feb. 6, 2003)*

DISPOSITION: [*1] Defendants' motion for summary judgment granted and plaintiff's complaint dismissed.

COUNSEL: For Six West Retail Acquisition, Inc., Counter Defendant: David A. Barrett, LEAD ATTORNEY, Barrett Gravante Carpinello & Stern LLP, New York, NY.

For Six West Retail Acquisition, Inc., Counter Defendant: Kent A. Gardiner, LEAD ATTORNEY, Crowell & Moring LLP, Washington, DC.

For Loews Fine Arts Cinemas, Inc., Counter Claimant: Brian J. Howard, Fried, Frank, Harris, Shriver & Jacobson, New York, NY.

For Sony Corporation, Defendant: Christopher N. Manning, Gerson A. Zweifach, LEAD ATTORNEYS, Williams & Connolly, L.L.P., Washington, DC.

For Sony Corporation of America, Defendant: Fredric W. Yerman, LEAD ATTORNEY, Kaye, Scholer, Fierman, Hays & Handler, New York, NY.

JUDGES: LORETTA A. PRESKA, United States District Judge.

OPINION BY: LORETTA A. PRESKA

OPINION:

OPINION AND ORDER

LORETTA A. PRESKA, United States District Judge:

Show business is a tough business.[1] After managing and operating plaintiff's theatres for nearly two decades defendants found themselves parties to a suit filed by plaintiff alleging breach of contract, breach of fiduciary duties, unjust [*2] enrichment, tortious interference, and violations of the federal antitrust laws. Now, after almost seven years of litigation, after voluminous submissions, numerous motions, and depositions taken on the other side of the globe, I address defendants' motions for summary judgment.

BACKGROUND

The plaintiff, Six West Retail Acquisition, Inc. ("Six West"), brings this action against various corporate and individual defendants alleging (1) breach of contracts related to the defendants' management of three movie theatres owned by Six West; (2) breach of fiduciary duties arising from defendants' management of those theatres; (3) tortious interference with the plaintiff's prospective business relations; (4) unjust enrichment; (5) restraint of trade in violation of Section 1 of the Sherman Act, *15 U.S.C. § 1*; (6) attempted [*3] monopolization in violation of Section 2 of the Sherman Act, *15 U.S.C. § 2*; and (7) anticompetitive merger in violation of Section 7 of the Clayton Act, *15 U.S.C. § 18*. (First Amended Complaint dated Dec. 4, 1997 ("Amended Compl.") PP 86-131). Following the close of discovery, plaintiff announced that it was abandoning the merger claim as it had "been compromised by subsequent events" (Letter from Jeffrey H. Howard to Judge Preska of 3/14/03, at 1 n.2), and I now address defendants' motions for

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[1] "Show Business is tough ... it's a dog eat dog world. No ... it's worse ... it's dog doesn't return another dog's phone call." Crimes and Misdemeanors (Image Entertainment 1989).

summary judgment on the remaining allegations pursuant to *Fed. R. Civ. P. 56.*[2] For the reasons set forth below,[3] defendants' motions are granted.

[*4]

I. The Facts

A. The Parties

Plaintiff Six West is a New York corporation with its principal place of business in New York, New York. (Amended Compl. PP 6, 34). Plaintiff leases out and controls three movie theatres in Manhattan: the New York Twin (the "Twin"), the Paris Theatre (the "Paris"), and the former Festival Theatre (the "Festival"). (Amended Compl. PP 4, 6). Sheldon H. Solow ("Solow") is a real estate developer who is Six West's owner, sole shareholder, and a corporate officer. (Amended Compl. PP 4, 6).

Defendant Loews Theatre Management Corporation ("Loews Theatres"), formerly known as Sony Theatre Management Corporation, is a Delaware corporation with its principal place of business in New York. (Amended Compl. P 7). Defendant Loews Fine Arts Cinema, Inc. ("Loews Fine Arts") is a subsidiary of Loews Theatres through which Loews Theatres conducted business with the Paris and Festival theatres.[4] (Amended Compl. P 10). Defendant

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[2] Defendants bring two motions for summary judgment: one on behalf of the "Sony Defendants," which primarily addresses the antitrust allegations, and one on behalf of the "Loews Defendants" and "Individual Defendants," which primarily addresses the breach of contract and fiduciary duty allegations.

[3] "The moment of truth boys. Somebody's life is about to change." Titanic (Twentieth Century Fox 1997).

[4] As Loews Theatres and Sony Theatres are the same entity, for clarity "Loews Theatres" will be used throughout.

Talent Booking Agency, Inc. ("TBA") is a New York corporation and Loews affiliate. (Amended Compl. P 9). Loews Theatres, TBA, and Loews Fine Arts refer to themselves collectively as the "Loews Defendants" and shall be referred to herein as [*5] the "Loews Defendants" or "Loews". (Loews Def.'s 56.1 Stmt at 3).

Defendant Sony Pictures Entertainment Corporation ("Sony Pictures") is a Delaware corporation and the parent company of Loews Theatres. (Amended Compl. P 11). Sony Pictures produces and distributes motion pictures, which are then (along with films from other companies) exhibited by Loews Theatres and other exhibitors. (Amended Compl. P 11). Defendant Sony Corporation of America ("Sony USA") is a New York corporation, and is the parent company of Sony Pictures. (Amended Compl. P 12). Defendant Sony Corporation is a Japanese corporation that is the ultimate parent of all the Sony entities. (Amended Compl. P 13). Sony Pictures, Sony USA, and Sony Corporation refer to themselves collectively as the "Sony Defendants" and shall be referred to herein as the "Sony Defendants". (Loews Def.'s 56.1 Stmt at 1).

Defendants James Loeks and Barrie [*6] Lawson Loeks are former Co-Chairpersons of Loews Theatres. (Amended Compl. P 14-15). Defendant Travis Reid ("Reid") is President of Loews Theatres and TBA. (Amended Compl. P 16). Defendant Seymour H. Smith ("Smith") is Executive Vice President of Loews Theatres and TBA. (Amended Compl. P 18). Defendant Thomas Brueggeman ("Brueggeman") is Vice President of Loews Theatres. (Amended Compl. P 17). Hereinafter, James and Barrie Loeks, Reid, Smith, and Brueggeman shall collectively be referred to as the "Individual Defendants".

B. The Twin

On December 13, 1978, Solow Theatre Corporation ("STC"), which leased the Twin from Solow pursuant to a lease agreement (the "Lease Agreement") of the same date (Loews Def.'s 56.1 Stmt P 4), and TBA entered into an agreement (the "Twin Agreement"), whereby TBA would operate and manage the Twin. (Twin Agreement § 3.01; Amended Compl. P 33; Loews Def.'s 56.1 Stmt P 2). Pursuant to the Twin Agreement, STC would receive 60% of the net theatre income, and TBA would receive 40%. (Twin Agreement § 4.04). STC and Solow, as tenant and landlord, respectively, entered into a Four Party Agreement dated December 13, 1978, with TBA and Loews, as operator and guarantor, [*7] respectively, whereby TBA and Loews agreed to assume the obligations of tenant, such as maintaining the premises, under the lease. (Pl.'s 56.1 Counterstmt to Loews P 4b).[5] As part of a transaction involving Chartwell Theatres, Inc., TBA and Solow entered into a letter agreement dated July 3, 1985, that amended the Twin Agreement (the "Chartwell Consent"). The Twin Agreement had a term of 15 years, from 1979 through 1993, and Loews exercised its right to extend the Twin Agreement, as amended by the Chartwell Consent, for another ten years. (Loews Def.'s 56.1 Stmt PP 19-20; Pl.'s 56.1 Counterstmt to Loews P 20 (disputing when Loews exercised its right of renewal)).

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[5] Six West submitted separate responses to "The Loews and Individual Defendants' Statement Pursuant to *Local Civil Rule 56.1*" ("Loews Def.'s 56.1 Stmt") and "The Sony Defendants' Statement Pursuant to *Local Civil Rule 56.1*" ("Sony Def.'s 56.1 Stmt"). Hereinafter, "Pl.'s 56.1 Counterstmt to Loews" and "Pl.'s 56.1 Counterstmt to Sony" shall be used to distinguish between Six West's responses to the Loews/Individual Defendants' 56.1 submissions and the Sony Defendants' 56.1 submissions, respectively.

C. The Paris and Festival

Solow began to operate the Paris theatre, which is allegedly one of the most prestigious theatres in the country and commonly used for movie premiers (Amended Compl. PP 43, 51), in 1990, and beginning on March 23, 1990, Loews and Solow Management Corporation began discussions regarding Loews' management of the Paris for Solow. (Loews Def.'s 56.1 Stmt P 40). Solow and Loews continued discussions and exchanged draft operating agreements until 1993 or 1994 but never executed a written agreement that explicitly set forth the terms governing Loews' operation of the Paris. (Loews Def.'s 56.1 Stmt P 41, Pl.'s 56.1 Counterstmt to Loews P 41, 41a-g). Nevertheless, it is undisputed Loews did operate the Paris theatre even though the parties now dispute the terms that governed Loews' operation of that theatre. Loews ceased operating the Paris on April 30, 1997. (Loews Def.'s 56.1 Stmt P 75).

At the same time as Loews began operating the Paris, Loews also began operating the Festival. (Amended Compl. P 47; Loews Def.'s 56.1 Stmt P 79). As with the Paris, draft operating agreements were exchanged by the parties, but the parties never entered into a signed agreement. [*9] (Loews Def.'s Stmt P 80; Pl.'s Counterstmt to Loews P 80a-d). The Festival ceased operations on August 21, 1994. (Loews Def.'s 56.1 Stmt P 92).

II. Procedural History

Six West filed the original complaint in this action on July 24, 1997, and the case was assigned to the Honorable David N. Edelstein. Following the public announcement of the merger between Loews and Cineplex Odeon, Six West filed the Amended Complaint on December 4, 1997, which added a Clayton Act claim alleging that the merger was anti-competitive (subsequently abandoned). All of the defendants filed a motion on January 8, 1998 to dismiss the Amended

Complaint for failure to state a claim pursuant to *Rule 12(b)(6)*. In an Opinion & Order dated March 9, 2000, Judge Edelstein denied most of defendants' motion to dismiss, but did dismiss the contract claims as against the Individual Defendants and held that the block-booking allegations could only proceed against Sony Pictures, as Sony Pictures is the only film distributor. See *Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp., 2000 U.S. Dist. LEXIS 2604, 2000 WL 264295* (S.D.N.Y. March 9, 2000).

I was assigned this case from Judge Edelstein on September 26, 2000, following **[*10]** Judge Edelstein's passing after almost fifty years of service on this Court.

On April 16, 2003, the Loews Defendants, Sony Defendants, and Individual Defendants all moved for Summary Judgment on all remaining claims in the Amended Complaint. The defendants also submitted joint motions in limine to exclude the testimony and reports of two of plaintiff's experts. On April 16, 2003, plaintiff also filed a motion in limine to exclude the testimony and report of one of defendants' experts. Submissions filed under seal from both parties followed.

DISCUSSION

I. Summary Judgment Standard

Pursuant to *Federal Rule of Civil Procedure 56(c)*, summary judgment shall be rendered forthwith if the pleadings, depositions, answers, interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*; see *Anderson v. Liberty Lobby, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

The moving party has the initial burden of "informing **[*11]** the district court of the basis for its motion" and

identifying the matter that "it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. The substantive law determines the facts which are material to the outcome of a particular litigation. See *Anderson, 477 U.S. at 250*; *Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1320 (2d Cir. 1975)*. In determining whether summary judgment is appropriate, a court must resolve all ambiguities, and draw all reasonable inferences against the moving party. See *Matsushita Elec. Industr. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* (citing *United States v. Diebold, Inc., 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)*).

If the moving party meets its burden, the burden then shifts to the non-moving party to come forward with "specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P. 56(e)*. The non-moving party must "do more than simply show there is some metaphysical doubt as to the material facts. **[*12]** *"Matsushita, 475 U.S. at 586.* However, only when it is apparent that no rational finder of fact "could find in favor of the non-moving party because the evidence to support its case is so slight" should summary judgment be granted. *Gallo v. Prudential Residential Servs., Ltd., 22 F.3d 1219, 1223 (2d Cir. 1994)*.

II. Plaintiff's Antitrust Claims

A. *Sherman Antitrust Act § 1* Tying Claims

Six West alleges, under two related but distinct theories, that the Sony Defendants' film distribution practices and the Loews Defendants' and Sony Defendants' licensing relationships are unreasonable restraints of trade in violation of Section 1 of the Sherman Act. That provision makes illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." *15 U.S.C.*

§ 1. To establish such a claim plaintiff must show: "'(1) a combination or some form of concerted action between at least two legally distinct economic entities; and (2) such combination or conduct constituted an unreasonable restraint of trade either per se or under the rule [*13] of reason.'" *Virgin Atlantic Airways Ltd. v. British Airways PLC, 257 F.3d 256, 263 (2d Cir. 2001)* (quoting *Tops Mkts., Inc. v. Quality Mkts, Inc., 142 F.3d 90, 95-96 (2d Cir. 1998))*.

1. Block-Booking

a. Standing

The Sony Defendants allege for the first time in their Reply that if there was any injury caused by the alleged block-booking by Sony Pictures the injury was only inflicted upon Loews and, thus, Six West lacks standing.[6] (Sony Def.'s Reply at 14). The Sony Defendants assert that as a landlord, Six West "was neither a consumer nor a competitor in the market in which trade was [allegedly] restrained" and, therefore; lacks standing to complain about foreclosure from the bidding process. (Sony Def.'s Reply at 14 (quoting *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 539, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)))*. In support of this lack of standing defense, the Sony Defendants cite to *Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1296 (2d Cir. 1971)*, in which a non-operating landlord of a theatre, which had been leased to an exhibitor, was held to [*14] lack antitrust standing.

Calderone is easily distinguishable from the situation at bar. Here, Six West is much more than a mere landlord as

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[6] "Surely you can't be serious." "I am serious, and don't call me Shirley." Airplane! (Paramount Pictures 1980).

Six West hired Loews to be its agent and perform the service of managing the three theatres and retained 60% of net profits. (Pl.'s Suppl. Opp. to Sony at 1).[7] This is in contrast to the situation in Calderone in which the non-operating landlord charged an annual rental (in which it did receive a percentage of the theatre's gross receipts on top of a fixed minimal rent) and did not pay the exhibitor for the provision of services in managing the theatres. *Id. at 1294*. The Twin, Paris and Festival are owned by Six West, and, if Six West's allegations of block-booking are true, then as a competitor in the film exhibition market, Six West has been directly injured by such anticompetitive behavior and has standing to pursue these claims. **[*15]**

b. Substantive Block-Booking Allegations

As Judge Edelstein described in his Opinion and Order denying the defendants' motion to dismiss plaintiff's *Section 1* claims, block-booking is "the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period" and is a type of tying arrangement. See *Six West, 2000 U.S. Dist. LEXIS 2604, 2000 WL 264295*, at *14 (quoting *United States v. Paramount Pictures, Inc., 334 U.S. 131, 156, 92 L. Ed. 1260, 68 S. Ct. 915 (1948))*. Such tying arrangements are per se illegal. See *Paramount Pictures, 334 U.S. at 158-59 (1948)*. Judge Edelstein noted that "actual coercion 'is an indispensable element' of a block-booking **[*16]** violation," id. (quoting *Unijax, Inc. v. Champion Int'l, Inc., 683 F.2d 678, 685 (2d Cir. 1982))*, and *Unijax, 683*

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[7] In fact, the Twin Agreement explicitly stated "nothing herein contained shall be deemed to create a landlord-tenant relationship, between Tenant [STC] and Operator [TBA]." (Twin Agreement § 5.01).

F.2d at 685, makes clear that "actual coercion by the seller that in fact forces the buyer to purchase the tied product" is required. Thus, "unless the buyer can prove that it was the unwilling purchaser of the allegedly tied products, actual coercion has not been established and a tying agreement cannot be found." *Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F.2d 186, 192 (2d Cir. 1992)* (emphasis added). At most, the facts to which Six West cites suggest that there were voluntary relationships between the Loews Defendants and film distributors, which are not per se illegal but rather ought to be evaluated under the rule of reason.

Though allowing both the block-booking and relationship licensing claims to go forward, Judge Edelstein warned Six West that it must delineate the *Section 1* claims more cogently as the case proceeded. See *Six West, 2000 U.S. Dist. LEXIS 2604, 2000 WL 264295*, at *20. Yet, Six West has continued to conflate the evidence relevant to the block-booking and relationship licensing allegations. [*17] A good deal of the evidence Six West cites to support the block-booking claim against Sony Pictures does not implicate Sony Pictures but rather touches on the relationships that Loews Theatres had with distributors other than Sony Pictures. From these descriptions of Loews' relationships, which very often do not even hint at coercion by any distributor - let alone name Sony Pictures specifically - Six West attempts to maintain a block-booking claim against Sony Pictures. Six West points out that at the summary judgment stage a court:

> should not view each piece of evidence in a vacuum. Seemingly innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background against which the behavior takes place. Evidence can take on added meaning when viewed in the

> context with all the circumstances surrounding the dispute.

(Pl.'s Opp. to Sony at 23 (quoting *Apex Oil Co. v. DiMauro, 822 F.2d 246, 254-55 (2d Cir. 1987)))*. Viewing Six West's argument in context, Six West proffers no evidence from which a jury could find that there was any "actual coercion" by the Sony Defendants that "in fact" forced any film exhibitor **[*18]** to purchase any unwanted films constituting a per se *Section 1* violation.

Six West refers to a number of letters, statements and documents that purportedly demonstrate, or create a reasonable inference of possible, coercion by Sony Pictures even though this evidence merely refers to distributors generally and not Sony Pictures. For example, Six West cites a 1990 letter from Alan Friedberg, Chairman of Loews, to Solow that states, "we do not have total control over the situation (film companies are increasingly arrogant and demanding) ... and there are 'relationships' with the film companies that dictate certain decisions." ((P)Misc. 9 (8/9/90 Letter from Friedberg to Solow)). This letter only refers to "film companies" in general, not Sony Pictures, and demonstrates only that exhibitors and distributors had relationships. Likewise Sony Theatres' (a.k.a. Loews Theatres) 1994 strategic plan, which states:

> Due to the smaller number of screens per location in many of our free zone theatres, [Loews] Theatres is forced tc make film selections, leading to better relationships with certain distributors. These distributors also tend to play more of their product in our competitive **[*19]** zones locations ...

((P)PX 141). Again this evidence simply demonstrates that Loews Theatres' decisions regarding what movies to exhibit may have been influenced by relationships that Loews had

with unnamed distributors. Six West's use of deposition testimony by Lawrence Ruisi, President and CEO of Loews Cineplex Entertainment, that Loews had relationships with distributors and sometimes took less desirable films to maintain access to more desirable films is similarly unavailing as evidence that Sony Pictures engaged in block-booking. (See Ruisi 115:6-16). At issue is whether there was any coercion by Sony Pictures, and evidence that Loews maintained relationships with distributors does not permit a reasonable juror to infer Sony Pictures engaged in coercion or the practice of block-booking.

Even when Six West does cite to evidence that relates to actions by Sony Pictures, the evidence fails to suggest that Sony Pictures attempted to coerce anyone. For instance, Six West cites Reid's deposition testimony that Loews had "relationships" with Sony Pictures, similar to relationships it had with other distributors, such that certain Sony Pictures releases were taken in order [*20] to preserve the ability to maintain access to other pictures. (Reid 68:18-70:8). Nowhere, however, does Reid imply that Loews' decisions were the result of any type of coercion by Sony Pictures. Despite Six West's statement to the contrary, without any hint of coercion by Sony Pictures, such conduct is not "archetypical block-booking" but rather archetypical relationship licensing. (Pl.'s Opp. to Sony at 18).

Perhaps Six West's strongest evidence, and the evidence that Judge Edelstein relied upon in allowing Six West's block-booking claim to survive defendants' motion to dismiss, is a letter dated January 16, 1996 from Reid to Solow responding to an inquiry of whether the film Sense and Sensibility, a Sony Pictures release, could be exhibited at the Twin. See *Six West, 2000 U.S. Dist. LEXIS 2604, 2000 WL 264295,* at *15. In that letter, Reid responded to Solow's inquiry by stating "this business does not work in such a way that we would only play 'Sense and Sensibility', but that we

would become obligated to play a full portion of the Sony Pictures release schedule." (PX 46). Based on this language, Judge Edelstein wrote, "at this point in the litigation, the facts suggest that Plaintiff's [*21] difficulty in acquiring more profitable movies may be attributed to its unwillingness or its inability to accept all of Sony Pictures' films." *Six West, 2000 U.S. Dist. LEXIS 2604, 2000 WL 264295,* at *15. I do not disagree with Judge Edelstein's finding that the language contained in Reid's letter was sufficient to survive a motion to dismiss. At that stage of litigation a court will not dismiss a complaint unless it appears beyond doubt that the plaintiff can prove no set of facts supporting a claim for relief. See *Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984)*; *Branum v. Clark, 927 F.2d 698, 705 (2d Cir. 1991).* Yet, at the summary judgment stage of litigation, while it is important not to deprive a deserving plaintiff of his or her day in court, when there are no genuine issues of material fact, summary judgment is both appropriate and required. *Fed. R. Civ. P. 56(c)*; see *Anderson v. Liberty Lobby, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).*

After years of discovery, Six West's block-booking claim rests almost entirely on these statements in Reid's letter, and I do not see how any [*22] reasonable juror could infer actual coercion from these few words.[8] Reid's use of the word "obligated" does not imply that Sony was exercising

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[8] The only other evidence cited by Six West that even hints at any threat by Sony Pictures is an e-mail from Sony Pictures' Eastern Division Manager to employees that states Sony might deny one theatre, not affiliated with Six West, access to future films if that theatre dropped the film Wolf before the film completed its run. ((P)PX 20). One angry internal e-mail regarding how long a film would run, without any proof that such a threat was even communicated to the theatre in question, is not enough to create an inference of actual coercion or block-booking.

any economic muscle or coercing anyone. See *American Mfrs. Mut. Ins. Co. v. American Broad-Paramount Theatres, 446 F.2d 1131, 1137 (2d Cir. 1971)* (coercion by a film distributor consists of the "actual exertion of economic muscle"). As Reid testified in his deposition, in a "competitive" exhibition market Loews would sometimes play films it did not "want as much" so as to preserve certain relationships with distributors. (Reid Depo. at 294:7-12; 308:5-12). This is a far cry from evidence of a distributor's actually conditioning access to one film on an exhibitor's taking a less desired film. See *United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 658-59 (2d Cir. 1989)* (finding direct evidence that a distributor's agent had forced an exhibitor to take one film in order to play another film). Taking a film that an exhibitor does not "want as much" in order to preserve a relationship with a distributor is not block-booking, is not per se illegal, and no reasonable juror could infer from Reid's **[*23]** letter to Solow that Sony Pictures was coercing Loews into taking one Sony film in order to get another Sony film. No other evidence presented by plaintiff suggests that the letter reflected anything more than the existence of a relationship between Sony Pictures and Loews.

I do not mean to insinuate that a plaintiff must present incontrovertible oral or written proof that a defendant has engaged in block-booking. Inferences of tying agreements drawn **[*24]** from circumstantial evidence are often all that is available, and if the evidence is sufficient to support such inferences these inferences are quite sufficient to survive a motion for summary judgment. See *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 545 (2d Cir. 1993)*; *Oreck Corp. v. Whirlpool Corp., 639 F.2d 75, 79 (2d Cir. 1980)*; *Caldwell v. American Basketball Ass'n, 825 F. Supp. 558, 566 (S.D.N.Y. 1993)*, aff'd, *66 F.3d 523 (2d Cir. 1995)*. The evidence presented by Six West,

however, is insufficient for any reasonable juror to infer that the Sony Defendants coerced any exhibitor to carry any films and engaged in unlawful block-booking.

For the above reasons, as Six West has failed to demonstrate any coercion by Sony Pictures, Six West's block-booking claim under *Section 1* must fail.

2. Relationship Licensing

In Paramount Pictures the Supreme Court rejected the notion that it was necessary to require a competitive bidding system in which exhibitors bid on films on a film-by-film basis. See, *334 U.S. at 162-166*. The Court questioned whether such a competitive [*25] bidding system would in fact foster competition, *id. at 162*, and more recently the Antitrust Division of the Department of Justice has found that relationship licensing, in which an exhibitor agrees to license a substantial number of a distributor's films, is often both permissible and pro-competitive. See Report of Department of Justice on the Legality of Customer Selection Under the Injunction in the Paramount Decrees Against Discrimination in Film,United States v. Loew's Inc., Equity No. 87-273 (ELP) (S.D.N.Y. Dec. 5, 1988), at 3 [hereinafter DOJ Report].

Plaintiff does not bring a separate relationship licensing claim in the Amended Complaint. *Six West, 2000 U.S. Dist. LEXIS 2604, 2000 WL 264295,* at *16-17. Rather, Judge Edelstein noted that in attempting to bring a block-booking claim, Six West had unwittingly alleged an alternative claim under *Section 1*. Id. He observed that while statements that identified booking relationships as voluntary could not support a block-booking claim, because the requisite coercion was lacking, they could support a relationship licensing claim. Id. Judge Edelstein held that if a voluntary relationship between an exhibitor [*26] and distributor "hinders other exhibitors' ability to acquire quality movies,

then such relationship licensing would violate § 1." *2000 U.S. Dist. LEXIS 2604, at 18.* Thus, unlike a block-booking violation of *Section 1*, in which actual coercion is the key to the claim, in a relationship licensing violation of *Section 1*, the key is the exclusion of other exhibitors from fair access to films. See id.; see also *Paramount, 334 U.S. at 154* (relationships that eliminate the opportunity for small theatres to obtain first run films stifle competition and violate *Section 1*); *United States v. Loews, Inc., 705 F. Supp. 878, 880 (S.D.N.Y. 1988).* Also unlike block-booking, because a relationship licensing claim involves a consensual agreement between exhibitors and distributors such a claim may stand against both a distributor and exhibitor if such an agreement forecloses access to films to other exhibitors. *Six West, 2000 U.S. Dist. LEXIS 2604, 2000 WL 264295,* at *18 n.34.

A claim for a relationship licensing violation of *Section 1* is analyzed under the rule of reason, and in order to survive a motion for summary judgment a plaintiff must show that a material question of fact exists as to [*27] whether the allegedly unlawful relationship reduced competition in the relevant market. See *Virgin Atlantic Airways, 257 F.3d at 264*; *PepsiCo., Inc. v. Coca-Cola Co., 114 F. Supp. 2d 243, 258-59 (S.D.N.Y. 2000)*, aff'd *315 F.3d 101 (2d Cir. 2002).* Although the relevant geographic market is disputed by each side, I find it unnecessary to resolve this issue because Six West has failed to proffer evidence that the alleged relationships have had any harmful effect on competition in any remotely relevant geographic market, including the "Upper Manhattan" market propounded by Six West.

Six West offers limited evidence concerning the Sony Defendants' relationships with any exhibitor in Upper Manhattan or any other market, and thus no reasonable juror could find that the Sony Defendants have engaged in illegal relationship licensing in violation of *Section 1.* Six West offers more evidence concerning the relationships that

Loews had with film distributors, but that evidence does not even begin to suggest that such relationships were anticompetitive.

The DOJ Report found that relationships between exhibitors and distributors are not necessarily [*28] anticompetitive. The DOJ Report suggested that such relationships may reflect rational economic choices based on complimentary risk-taking attitudes and may reflect an on-the-merits consideration of transaction costs of licensing films separately. DOJ Report at 43-44. However, the DOJ Report recommended that exhibitor and distributor relationships might violate *Section 1* if they involve:

> circuit dealing, favoritism towards affiliates, preferential contract terms, or rejection out-of-hand of competing exhibitors' offers without any "on-the-merits" determination, [and] the mere fact that relationship licensing is also involved will not immunize that conduct.

Id. at 50-51. None of Six West's evidence suggests that any rational juror could find that any of the Loews Defendants engaged in any of this prohibited behavior. While it is reasonable to believe that Loews' relationships may have reflected certain efficiencies or risk-taking attitudes, there is no evidence that Loews engaged in any activities that foreclosed Six West's theatres or other exhibitors from access to films.

As discussed above, much of the evidence Six West relies on for its block-booking claim [*29] against Sony Pictures relates to the relationships that Loews has with distributors generally. This evidence regarding relationships, however, amounts to at most that Loews sometimes exhibits movies it is less interested in in order to maintain relationships with film distributors. That Loews had relationships with distributors is undisputed, but Six West's

evidence fails to suggest that these relationships foreclosed other exhibitors from access to films and harmed competition. Six West attempts to demonstrate foreclosure through evidence that the Twin has been "unable to acquire movies from Sony [Pictures]," but Six West fails to explain how relationship licensing by the Sony Defendants or the Loews Defendants is in any way connected to that failure. (Pl.'s Opp. to Sony at 27).

In addition to Six West's failure to put forth evidence of anticompetitive licensing relationships that stifled competition, the indirect evidence available suggests that competition in the Manhattan theatre market is not dwindling but is actually quite robust. During the time in which Loews' relationships are alleged to have decreased competition, the number of movie screens in Manhattan increased almost [*30] 60%, as exhibitors - including, but not limited to Loews - opened numerous new theatres or expanded old ones. (Loews Def.'s 56.1 Stmt P 11). Along with the new screens more films are shown in Manhattan (Loews Def.'s 56.1 Stmt P 23), and multi-screen theatres are becoming more prevalent (Loews Def.'s 56.1 Stmt P 7); see also *United States v. Syufy Enters., 903 F.2d 659, 665 (9th Cir. 1990)* (success of more efficient multi-screen theatres can be evidence of robust competition). While movie ticket prices have risen in Manhattan, the rise has been at a slower pace in Manhattan than in the rest of the country. See National Assoc. Theatre Owners, www.natoonline.org/statistictickets.htm (33% increase in Manhattan versus 38% average national increase from 1994-2001). Nor could Six West's assertion that Loews increased prices in order to increase profits (why else would a theatre increase ticket prices) and allegation that a Loews employee once stated "Loews theatre is of course a leader in admission prices" lead a reasonable juror to believe that Loews had the power unilaterally to raise prices or had anticompetitive

market power. See *K.M.B Warehouse Dist., Inc. v. Walker Mfg. Co., 61 F.3d 123, 129 (2d Cir. 1995)* **[*31]** (a prerequisite for recovery in all *Section 1* claims is either actual adverse effect on competition or market power to raise prices significantly without losing all of one's business).

Six West also cites to an alleged decrease in the quality of the movie-going experience as evidence of a harm to competition and consumers. See *Virgin Atlantic Airways, 257 F.3d at 264* ("reduced output, increased prices and decreased quality" can all constitute harm to consumers). Though true that a reduction in quality can constitute a harm to consumers, the mere possibility that a consumer might have to see his or her first choice movie at his or her second choice theatre or his or her second choice movie at his or her first choice theatre (Pl.'s Opp. to Sony at 34-35), is not an actionable restraint of trade. Every licensing agreement between an exhibitor and distributor will restrain trade to some extent, as licensing agreements necessarily entail that a film is shown at one theatre and not another. See *Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)* (*Section 1* is only intended to prohibit "unreasonable" restraints of trade). **[*32]** But the mere fact that a consumer who might, for example, prefer to watch a film at the Twin has to instead go to another nearby theatre to see that film does not mean that there has been an actionable harm to consumer choice or competition. See *Virgin Atlantic Airways, 257 F.3d at 259* ("the antitrust laws are designed to protect competitive conduct, not individual competitors."). Six West essentially asks that I compel Sony Pictures to license its films to Six West's theatres. The antitrust rules require no such compulsion. See *Orson, Inc. v. Miramax, Inc., 79 F.3d 1358, 1365 (3d Cir. 1996).*

For the above reasons, because Six West has failed to demonstrate that the Sony Defendants or the Loews

Defendants have been involved in any anticompetitive relationship licensing, Six West's *Section 1* claim for relationship licensing must fail.

B. Six West's *Sherman Antitrust Act § 2* Monopolization Claims

In order to demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*; **[*33]** *Tops Market, Inc. v. Quality Markets, Inc., 142 F.3d 90, 99-100 (2d Cir. 1998)*. In order to determine whether there is a dangerous probability of monopolization, it is necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market. *Spectrum Sports, Inc., 506 U.S. at 456*.

As the Sony Defendants point out in their brief, Six West only opposes the motion for summary judgment on the *Section 2* monopolization claims as against the Loews Defendants. (Def.'s Reply at 19; Pl.'s Opp. to Sony at 39). As plaintiff presents no facts supporting the claim that any of the Sony Defendants have done anything to render themselves dangerously close to achieving a monopoly, summary judgment on behalf of the Sony Defendants for the *Section 2* claims is granted. Though Six West attempts to mount a more significant opposition to summary judgment with regards to the Loews Defendants, it is to no avail. On the basis of the facts presented by plaintiff, there is no possibility that a rational finder of fact could determine that any of the Loews Defendants attempted to monopolize any Manhattan theatre markets.

As discussed [*34] above, some question remains as to the relevant geographic market. Even conceding the possibility of Upper Manhattan as the relevant geographic market, however, the facts do not support a finding that the Loews Defendants attempted to monopolize that, or any other, market. After extensive discovery, Six West has not proffered evidence to support the elements necessary to maintain an attempted monopolization claim against Loews.

Most tellingly, there are no facts to suggest that Loews engaged in any predatory or anticompetitive behavior or had a specific intent to monopolize the Upper Manhattan theatre market. None of the Loews Defendants could have engaged in block-booking (as Loews was an exhibitor not a distributor), and the facts do not support an inference that they engaged in any illegal licensing practices. As such, the Loews Defendants' licensing practices are not anticompetitive or predatory. With respect to Six West's allegations that Travis Reid once told a Mr. Robert Smerling who then allegedly told Mr. Solow that Mr. Reid and other defendants "would make every effort to influence distributors not to deliver quality films to plaintiff's theaters," (Amended Compl. P 84; [*35] Solow 10/25/02 Depo. at 63:12-64:2, Solow 9/28/99 Depo. at 336:8-12), Six West does not point to a single fact, aside from this inadmissible hearsay, to support that this was ever actually said or that any defendant ever attempted to prevent Six West's theatres from receiving any films from any distributor. See, e.g., *Manessis v. N.Y. City DOT, 2003 U.S. Dist. LEXIS 1921, No. 02 Civ. 359 (SAS), 2003 WL 289969, at *14 (S.D.N.Y. Feb. 10, 2003)* ("[Inadmissible hearsay] cannot create a material issue of fact to defeat summary judgment."), aff'd *2004 WL 206316 (2d Cir. 2004)*.

Six West's assertion that Loews' alleged mismanagement of the theatres could amount to predatory conduct is similarly unhelpful. Six West hypothesizes that Loews

mismanaged the theatres in order to divert "would-be customers of plaintiff's theatres" to a "Loews theatre in Upper Manhattan," where Loews retained 100%, rather than 40%, of the net profits (Pl.'s Opp. to Sony at 39). This hypothesis does not create a triable issue of fact. Mismanaging theatres in which Loews itself had an interest is not a typical predatory or anticompetitive activity, and it is somewhat far-fetched to suggest that [*36] the alleged mismanagement of the three theatres was predatory or anticompetitive. That said, it is not inconceivable that Loews' alleged mismanagement of plaintiff's theatres could be anticompetitive if the alleged mismanagement was intended to, or did result in, an increase in Loews' net market power. I need not consider this unlikely possibility, however, because the facts do not support this hypothesis.

As Six West's own expert concedes, Loews could not ensure that diverted customers would end up at other Loews theatres. (Warren-Boulton Rep. at 13). As such, the likelihood is that any mismanagement of the Twin, Paris, or Festival would cause customers to go to theatres unaffiliated with Loews, thereby decreasing, rather than increasing, Loews' share of the exhibition market. (Warren-Boulton Rep. at Ex. 2).[9] Because Six West's hypothesis that Loews intentionally mismanaged the Twin, Paris, and Festival in order to divert customers from plaintiff's theatres into Loews' theatres is both unlikely on its face and has no factual support, no rational juror could infer that this alleged mismanagement was predatory conduct.

[*37]

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[9] Loews would have recovered on average 10% of the lost Twin customers if those customers remained on the East Side of Manhattan, and, at most 50% in some years if those customers traveled to other neighborhoods. (Warren-Boulton Rep. at Ex. 2).

In addition to failing to expose facts suggesting predatory behavior or specific intent, Six West also fails to establish that Loews is close to achieving a dangerous probability of achieving market power. Assuming arguendo that Upper Manhattan is the relevant market and that plaintiff's expert is correct that Loews' share of that market has risen from 23% to 53% in nine years (Pl.'s Opp. to Sony at 4), as a matter of law this fact alone does not create a dangerous probability of monopolization. Judge Hand's oft-cited numerical test of 90% yes, 64% maybe and 33% no for monopoly power in *United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945)*, suggests that a market share of 53% might justify further inquiry.[10] Yet, an inquiry into whether there is a dangerous probability of achieving monopoly power cannot be resolved by simply by looking at Loews' market share of the Upper Manhattan theatre market. See, e.g., *PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 109 (2d Cir. 2002)*("Absent additional evidence, such as an ability to control prices or exclude competition, a 64 percent market share is insufficient to infer monopoly power. **[*38]** "); *Tops Mkts., 142 F.3d at 99* (holding that "a share between 50% and 70% can occasionally show monopoly power," but only if other factors support the inference). Aside from pointing to Loews' market share, Six West does not provide any evidence from which a reasonable juror could infer that the Loews Defendants had a dangerous probability of achieving market power.

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[10] If the market is indeed the East Side of Manhattan only, as the defendants suggest, then clearly Loews did not have the requisite market power as Loews' percentage of that geographic market was never greater than 18% by box office revenue (excluding the Twin) or 21% by screens (including the Twin). (Sony Def.'s Br. at 38).

For the above reasons, Six West has not proffered evidence from which any of the elements required to sustain an attempted monopolization claim could be found and, therefore, the *Section 2* claims must fail.

III. Plaintiff's State Law Claims

A. The Twin

1. Assignment of the Twin Agreement

The Twin Agreement [*39] expressly stated that any assignment from STC to another party required that the intended assignee deliver a written agreement to Loews stating that the assignee agreed unconditionally to be bound by and perform all of STC's obligations. (DX 34 § 10.01). When STC assigned all of its "right, title and interest" to Solow in 1979, an Assignment and Assumption Agreement was executed in compliance with the Twin Agreement. (DX 39). However, Loews now complains that a subsequent assignment was never made to Six West, and, therefore, Six West has no standing to assert its claims relating to the Twin. (Def.'s Br. at 18). Loews' argument is unavailing.

The January 16, 1992 request of Steve Cherniak, Controller of Solow Development Corp., that Loews void uncashed checks to Solow and reissue them to Six West was not a sufficient written document evidencing assignment to comply with the assignment clause of the Twin Agreement. (See DX 42 (1/17/92 letter from Claude J. Baptiste, Asst. Treas. of Loews, to Cherniak acknowledging 1/16/92 request and enclosing reissued checks)). Additionally, deposition testimony does raise some question as to whether Six West was ever intended to be an assignee [*40] or whether Solow was to remain the designated "Tenant" under the Twin Agreement despite the payment of monies to Six West. (Cherniak Depo. at 65:17-66:24). At the very least, whether

assignment to Six West was ever intended creates a triable issue for the jury.

If the assignment to Six West was intended but did not comply with the written assignment requirement of the Twin Agreement, then there is a triable issue of fact as to whether Loews waived that requirement. Loews cites to a number of cases to support the proposition that contractual limitations on assignment are binding conditions and will be enforced. (Loews Def.'s Br. at 18-19). While in no way disputing the holdings in those cases that assignment clauses are enforceable, I note that a party can waive a contractual right if there is a "voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable." See *AXA Global Risks U.S. Ins. Co. v. Sweet Assocs., 302 A.D.2d 844, 755 N.Y.S.2d 759, 760 (3d Dep't 2003)* (internal quotations and citations omitted). A waiver "may be established by affirmative conduct or by failure to act as to evince an intent not to claim [*41] a purported advantage." Id. Here, following the 1992 letter, Loews willingly made payments to, and dealt with, Six West for eleven years. See *Belge v. Aetna Cas. & Sec. Co., 39 A.D.2d 295, 334 N.Y.S.2d 185, 189 (4th Dep't 1972)* (holding that passive conduct constituted a waiver of the provision against the assignment of the contract). Certainly this raises a question of material fact as to whether Loews' failure to raise any objections waived the right to have a proper written notification of the assignment pursuant to Section 10.01 of the Twin Agreement.

2. Loews' Alleged Breach of the Twin Agreement

a. Film Booking at the Twin

Section 7.01 of the Twin Agreement, as modified by the Chartwell Consent, required that Loews exhibit at the Twin:

> only first run motion pictures (or reissues distributed on a first run basis) of the type, quality and character equal to or better than motion pictures exhibited at the other theatres operated under the "Loews" name and situated on the east side of Manhattan such as the Loews Tower East and the Loews 34th Street Showplace Theatre.

(DX 6; DX 34). Six West alleges that Loews breached this contractual standard by exhibiting [*42] films that were not "first run motion pictures" and did not comply with the "type, quality and character" requirement. I disagree and do not see how any reasonable juror could find Loews breached this contractual obligation.

Six West attempts to demonstrate a breach of the "type, quality and character" requirement with evidence that revenues per seat at the Twin were lower than at other Loews theatres and that Loews had a tendency to exhibit films for a longer length of time at the Twin. However, as a matter of law I find that neither this nor other similar evidence has anything to do with the "type, quality and character" of a film. New York courts interpret a contract by giving unambiguous terms their plain and ordinary meaning, and a court may determine such meaning as a matter of law. See *Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 780 N.E.2d 166, 750 N.Y.S.2d 565, 569 (N.Y. 2002)*; *Levitt v. Computer Assocs. Int'l, Inc., 306 A.D.2d 251, 760 N.Y.S.2d 356, 357 (2d Dep't 2003)*. The plain and unambiguous meaning of "type, quality and character" unquestionably refers to the attributes and traits of the films themselves and not the manner in which those films are [*43] exhibited.[11]

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[11] "Type" is defined as "1. A group of persons or things that share common traits or characteristics distinguishing them as an identifiable

(continued...)

Though quality is a subjective measure that Six West correctly notes is often a question of fact to be decided by a jury (Pl.'s Opp. to Loews at 7 (citing cases)), in this instance, Six West presents no evidence from which a jury could infer that the films exhibited at the Twin did not meet the "type, quality and character" standard. Six West's argument notwithstanding, the duration of a film's run at a theatre, when the film began showing at the theatre relative to when the film opened, or ultimate box office revenue do not relate to the inherent quality of a film. (Pl.'s 56.1 Counterstmt to Loews PP 11-14).

[*44]

This is not to say that if Loews exhibited films for an excessively long duration or undertook other actions that failed to maximize profits at the Twin Loews could not be in breach of the Twin Agreement. If, as Six West is fond of pointing out, Loews exhibited the same film for 52 weeks at the Twin then Loews would most likely not be maximizing profits, as films usually generate lower revenues at the end of their runs. (Pl.'s Opp. to Loews at 10). This may be true and it may be a breach of the Twin Agreement, but such an action cannot be a breach of Section 7.01, as modified. Six West simply defies the plain meaning of the Chartwell Consent when it states that a film in its fifty-second week of exhibition is of a different "type, quality and character" than that very same film in its first week of exhibition. The essential character of the film, whether it be a "good" film or

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(...continued)
group or class: CATEGORY." WEBSTER'S II NEW COLLEGE DICTIONARY 1193 (2001). "Quality" is defined as "1. Essential character: NATURE, 2. a. An inherent or distinguishing attribute: PROPERTY, b. A character trait." Id. at 905. "Character" is defined as "2. A distinctive feature or attribute: CHARACTERISTIC." Id. at 187.

a "bad" film or somewhere in between, remains the same throughout the duration of the films exhibition. Exhibiting a "good" film for 52 weeks may fail to maximize profits, which may be a breach of the Twin Agreement, but that breach would not violate Section 7.01. However, such conduct could breach Section 5.09. **[*45]** [12]

Section 5.09 of the Twin Agreement requires that Loews "use every reasonable effort to promote and further the profitable operation of [the Twin]." (DX 34). Much of the conduct about which Six West complains; such as exhibiting films for too long, exhibiting the same film on both screens at the Twin, or failing to maximize revenue per seat; has nothing to do with the quality of the films booked at the Twin but instead relates to a possible failure by Loews to operate the Twin in a profit maximizing manner. Without passing judgment on the adequacy of Six West's proffered evidence to support such a claim of failure to maximize profits, such a failure relates only to Section 5.09, for which the sole **[*46]** remedy for a breach is the termination of the Twin Agreement. (DX 34). Section 5.09 explicitly precludes damages for any failure to "promote and further the profitable operation of [the Twin]," and Six West cannot get around such unambiguous language by bringing a claim for damages under Section 7.01, when the conduct about which Six West complains has nothing to do with the "type, quality or character" of the films exhibited at the Twin.

With respect to the obligation created by Section 7.01 for Loews to book only "first run" films at the Twin, I find that

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[12] I note that while Judge Edelstein stated that "exhibiting movies at the Twin for a protracted period" was alleged to be a violation of the Twin Agreement, he never implied that such a protracted exhibition could suffice as evidence of a breach of Section 7.01. *Six West, 2000 U.S. Dist. LEXIS 2604, 2000 WL 264294*, at *11.

Six West's proposed meaning of the term, which would require that a film have never been exhibited in any theatre prior to being exhibited at the Twin, does not comport with the unambiguous meaning or customary use of the term. See *Hernandez v. Schenectady Non Invasive Vascular Diagnostics, P.C., 267 A.D.2d 573, 699 N.Y.S.2d 232, 233 (3d Dep't 1999)* (trial court properly accorded term its customary and ordinary meaning). Instead, as used in the Twin Agreement, "first run" refers to the initial stages of a film's release in which the film is exhibited at a theatre charging full price. (Loews Def.'s Br. at 6; Loews Def.'s Reply [*47] at 13). Both Loews' and Six West's experts agreed with this definition of the term "first run," and Six West offers no convincing rationale for abandoning this plain meaning. (Jacobs Depo. at 38:23-41:9; Reid Depo. at 28:2-11, 111:5-112:5; Brueggemann Depo. at 52:18-54:3, 55:10-20; Bunnell Depo. at 213:18-214:5). Under this definition, Six West fails to proffer sufficient evidence from which a reasonable juror could find that Loews did not comply with its obligation to book "first run" films as required by the Twin Agreement.

b. Maintenance of the Twin

Under Section 3.02 of the Twin Agreement, Loews accepted the obligation to maintain the Twin pursuant to Section 15.04 the lease agreement. (DX 34; DX 35).[13] Six

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[13] Section 15.04 of the Lease Agreement states:

> Tenant shall, at all times during the term of this lease, keep in the theatres and maintain in good condition and working order and free of all liens and encumbrances and claims of third parties, all such projection equipment, sound equipment, ticket booth equipment, screens, drapery tracks, draperies, drapery motors, masking motors, carpeting, seats, aisle lights, lighting fixtures,

(continued...)

West has put forth evidence allegedly demonstrating Loews' failure to maintain the Twin, but even when viewed in the light most favorable to Six West, this evidence could not lead a rational juror to conclude that Loews did not fulfill its contractual obligation.

[*48]

A good deal of the evidence cited by Six West as proof of Loews' breach consists of no more than a recognition by Loews that, as in any business into which the public is invited, business tools, objects and premises sometimes need to be repaired, replaced and updated. For example, Six West cites to a "Loews Theatres Visitation Report" dated August 16, 1997 that notes a "bad smell" in the theatre as evidence of Loews' breach, but Six West fails to note that the same evaluation also gives the Twin a 92% score and writes "Good job by our staff." ((P)PX 164).[14] This hardly suggests a failure to maintain the Twin. Loews' recognition of items for improvement could not lead a rationale juror to the conclude that Loews' breached the Twin Agreement.

Also unavailing is Six West's suggestion that because [*49] the Twin did not have a new Sony Dynamic Digital

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(...continued)

> concession equipment, lobby and lounge furniture and attraction signs and any other trade fixtures, equipment, decorations and furnishings, as shall be necessary or desirable for the efficient operation of the Theatres as first class motion picture theatres.

(DX 35).

[14] That the bad smell was noted by Loews as an issue to be addressed on two other occasions over the course of one month, ((P) PX 165; (P) PX 152), is hardly enough evidence to suggest a breach of the Twin Agreement.

Sound ("SDDS") System installed until after a number of Loews' other theatres received SDDS, that was somehow a breach of the Twin Agreement. (Pl.'s Opp. to Loews at 18). Nowhere did the Twin Agreement require Loews to provide upgrades to the Twin before other theatres, and a reasonable decision as to how to allocate resources cannot amount to a breach of a contractual maintenance obligation.

Six West also cites to a July 1997 memorandum in which Loews writes that the Twin "is in dire need of major renovations." ((P) PX 71). Taken out of context this language could be read to suggest that Loews had failed to maintain the Twin to such a degree that major renovations were needed. However, the context of the memorandum makes clear that the Loews was considering "major renovations" as necessary in order to keep pace with the competition in the neighborhood, specifically United Artist's Gemini theatre and Cineplex's Beekman theatre, which were being renovated. ((P) PX 71). No reasonable jury could find that Loews' determination that renovations were necessary to upgrade the Twin in order to keep pace with the competition meant that Loews [*50] had previously failed to fulfill its contractual obligations to maintain the Twin.

3. Six West's Claims for Unjust Enrichment

"The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi-contract for events arising out of the same subject matter." *EUA Cogenex Corp. v. North Rockland Cent. Sch. Dist., 124 F. Supp. 2d 861, 874 (S.D.N.Y. 2000)*. Here, there is no dispute as to the existence of a contract governing the dispute, and neither Six West nor Loews contends that the Twin Agreement is not an enforceable contract meant to govern the operation of the Twin; the only dispute is as to Six West's standing to assert claims under that agreement. However, the preclusion of an

unjust enrichment claim when there exists a valid contract governing the conduct in question holds "true whether the contract is one between parties to the lawsuit, or where one party to the lawsuit is not a party to the contract." *Granite Partners, L.P. v. Bear, Stearns & Co., 17 F. Supp.2d 275, 311 (S.D.N.Y. 1998)*; see also *Metropolitan Elec. Mfg. Co. v. Herbert Constr. Co., Inc., 183 A.D.2d 758, 583 N.Y.S.2d 497, 498* **[*51]** *(2d Dep't 1992)*.

As it is undisputed that the conduct about which Six West now complains was governed by the Twin Agreement, Six West's claims for unjust enrichment must fail even if Six West were found not to have standing. Alternatively, for the reasons stated above, even if the existence of the Twin Agreement did not somehow preclude a claim for unjust enrichment, Six West has not set forth facts from which a reasonable juror could determine that Loews did anything improper that would entitle Six West to the quasi-contractual remedy of restitution.

4. Loews' Alleged Breach of Fiduciary Duties

Both Six West and Loews agree that Section 5.09 of the Twin Agreement defined a contractual fiduciary duty whereby Loews would act as Six West's fiduciary in managing the Twin. (DX 34 § 5.09). Both parties also agree that Section 5.09 limited Six West's remedy for any breach by Loews to termination. Section 5.09 in relevant part stated:

> [Six West's] sole remedy for any violation of [Loews'] obligations under this Section shall be to terminate this Agreement and [Six West] shall not assert any claim for damages for any such violation.

(DX 34). Six West attempts to get **[*52]** around this limitation on remedies by arguing that Loews "intentionally, willfully and maliciously" breached its fiduciary duties,

rendering the liability limitation unenforceable. (Am. Compl. P 97; Pl.'s Opp. to Loews at 21). See *Kalisch-Jarcho, Inc. v. City of New York, 58 N.Y.2d 377, 448 N.E.2d 413, 461 N.Y.S.2d 746, 749-50 (N.Y. 1983).*

Six West's evidence of willfulness consists of Loews' alleged mismanagement of the Twin, Loews' and the Sony Defendants' alleged relationships with film distributors meant to keep the Twin from receiving quality films, and Loews' alleged diversion of customers from the Twin to its own theatres. With respect to the mismanagement claim, I find that the evidence is wholly lacking, and, in any event, such mismanagement would not rise to the necessary level to void the express limitation of liability contained in Section 5.09. See *Metropolitan Life Ins. Co. v. Noble Lowndes Int'l, 192 A.D.2d 83, 600 N.Y.S.2d 212, 216 (1st Dep't 1993)*, aff'd *209 A.D.2d 814, 618 N.Y.S.2d 152 (N.Y. 1994)*. With respect to Loews' alleged relationships to keep films from the Twin, as discussed more fully above, I hold that there was nothing improper regarding [*53] any of the Loews Defendants' or Sony Defendants' relationships with any film distributors or that the Twin was improperly precluded from obtaining any films from distributors as a result of any defendants' actions. See supra, part II.A. Similarly, with respect to the allegation that Loews diverted customers from the Twin to its other theatres, as discussed in more detail above, I find such a theory both implausible and mere conjecture wholly unsupported by the facts. See supra, part II.B.

For the reasons stated above, Six West's claims for breach of the Twin Agreement, unjust enrichment, and breach of fiduciary duties at the Twin must fail.

B. The Paris

1. The Alleged Breach of the "Paris Agreement"

It is undisputed that a final written agreement governing Loews' management of the Paris was never executed. (Loews Def.'s 56.1 Stmt P 41, Pl.'s 56.1 Counterstmt to Loews P 41a-g). Rather, Six West alleges that despite the absence of a final written contract, documents exchanged by the parties and the parties' course of dealing demonstrate that Six West and Loews entered into a binding agreement whereby Loews would operate the Paris according to certain agreed upon terms and [*54] conditions (the "Paris Agreement"). (Pl.'s Opp. to Loews at 25; Pl.'s 56.1 Counterstmt to Loews P 41a-g). In essence, Six West is proposing that the Paris Agreement is an implied-in-fact contract, a contract evidenced by the acts of the parties rather than the oral or written words of the parties. See *Radio Today, Inc. v. Westwood One, Inc., 684 F. Supp. 68, 71 (S.D.N.Y. 1988)*; *Miller v. Schloss, 218 N.Y. 400, 406, 113 N.E. 337 (1916)*. The existence and terms of implied-in-fact contracts are generally issues of fact for a jury to decide. See *Rocky Point Properties, Inc. v. Sear-Brown Group, Inc., 295 A.D.2d 911, 744 N.Y.S.2d 269, 271 (2d Dep't 2002)*. However, the facts of the situation at bar make it clear that the implied-in-fact contract proposed by Six West did not exist and that the implied-in-fact contract that did exist was never breached by any of the defendants.

Six West proposes that the terms of the alleged Paris Agreement can be discerned by examining two letter agreements exchanged between Six West and Loews because those letters contained some overlapping terms. (Pl.'s Opp. to Loews at 28). What Six West overlooks is that the first [*55] of the proposed letter agreements sent by Six West on October 1, 1993 (DX-21) was explicitly rejected by Loews on October 19, 1993 (DX-22), and the second proposed letter agreement dated May 19, 1994 (DX-24) was never accepted by Six West and negotiations continued. Thus, these letter

agreements do not provide any evidence of mutual assent to the material terms of the alleged implied-in-fact contract.

From October of 1993 through May of 1994, when the two proposed letter agreements were exchanged, Six West and Loews were no doubt involved in negotiations for an operation and management agreement for the Paris. That the parties' proposals happened to overlap on some proposed terms is not surprising and is to be expected, but such an overlap on some terms during negotiations is not evidence that the parties intended to enter into a binding contractual relationship on those overlapping terms. When an offered responds to an offer or with an explicit rejection of the offeree's proposal and makes a counteroffer that accepts some of the terms of the original offer but rejects others and adds new terms, the offer has not been accepted, and there is no agreement between the parties. See **[*56]** *Krumme v. Westpoint Stevens, Inc., 143 F.3d 71, 83-84 (2d Cir. 1998)*; see also *Wasserstein Perella Emerging Mkts. Fin., L.P. v. Province of Formosa, 2002 U.S. Dist. LEXIS 12012, 97 Civ. 793 (BSJ), 2002 WL 145831 (July 2, 2002)* ("In light of the history of the parties' negotiations and the court's comparison of the terms incorporated into the April 1 and April 11 letters, the court finds that the communications never indicated mutual assent sufficient to give rise to a binding contract."). In such a case, courts do not hold that there is a partial agreement with regards to the overlapping terms; there is simply no agreement. "'A contract cannot be implied-in-fact where the facts are inconsistent with its existence; or against the declaration of the party to be charged or against the intention or understanding of the parties.'" *Tjoa v. Julia Butterfield Memorial Hospital, 205 A.D.2d 526, 612 N.Y.S.2d 676, 677 (2d Dep't 1994)* (quoting *Miller v. Schloss, 218 N.Y. 400, 406-07, 113 N.E. 337 (1916)).* Likewise, without an explicit or implicit acceptance of either of the proposed letter agreements on the terms contained

therein, there was no agreement, and there is [*57] no implied-in-fact contract comprised of the overlap in terms between the October 1, 1993 and May 18, 1994 letters.

Six West cites a number of cases for the indisputable proposition that if two parties come to an oral or preliminary agreement that agreement is an enforceable contract regardless of whether the parties ever execute a final written contract. (Pl's Opp. to Loews at 25-26). Yet, the cases cited by Six West, such as *Lazard Freres & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1537 (2d Cir. 1997)* and *Consarc Corp. v. Marine Midland Bank, 996 F.2d 568, 574-76 (2d Cir. 1993)*, involve situations in which the parties have moved beyond negotiations and have entered into a binding agreement. See also *Paper Corp. of the United States v. Schoeller Technical Papers, Inc., 807 F. Supp. 337, 347 (S.D.N.Y. 1992)*; *Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co., 670 F. Supp. 491, 497-98 (S.D.N.Y. 1987)*. That is simply not the situation here. Six West presents no facts to suggest that Six West and Loews mutually assented to be bound by an agreement while waiting to execute a final written agreement. As there is [*58] no evidence that the letter agreements were ever assented to by the parties, the cases relied upon by Six West are inapposite. Compare *Consarc, 996 F.2d 568, 573* ("The combined writings contain no expression by either party of any intent not to be bound by them."), with *Winston v. Mediafare Entm't Corp., 777 F.2d 78, 81 (2d Cir. 1986)* (the writings exchanged make clear that no binding oral agreement had been reached and the unexecuted versions of the agreement were nothing more than drafts and not final binding agreements). Finally, the mere fact that there was performance by Loews is insufficient to support a finding that the parties had reached an agreement on the alleged overlapping letter agreement terms. See *Teachers Ins. & Annuity Ass'n of Am., 670 F. Supp. at 507* (partial performance does not necessarily imply

mutual assent as "[a] party may make some partial performance merely to further the likelihood of consummation of a transaction it considers advantageous."). Because Six West has set forth no facts from which a reasonable juror could infer that the parties had an implied-in-fact contract with the terms contained in the [*59] two proposed letter agreements, no trier of fact could find that Loews breached such a contract.

Although the fact that there was some overlap in the terms in proposals exchanged between Six West and Loews cannot alone imply that the parties had mutually assented to be bound by those terms, there can be no doubt that the parties did have an implied-in-fact agreement regarding the operation of the Paris. The conduct over the course of the seven years by the two parties demonstrates that Loews was to book films at the Paris and split profits with Six West, such that Six West would receive 60% of the profits. (Loews Def.'s Br. at 10). Yet, Six West points to no other conduct or facts to support the contention that any of the other alleged terms of the Paris Agreement are to be implied. Nowhere does Six West proffer any facts or course of conduct that would suggest that Loews was required to obtain Six West's consent before entering into "four-wall deals" at the Paris. (Pl.'s Opp. to Loews at 33). Similarly, nowhere is there any course of conduct or facts to support the contention that Loews would be responsible for maintaining the Paris and supply such amenities as digital sound, (Pl. [*60] 's Opp. to Loews at 35), or that Loews would be obligated to book films on an exclusive basis at the Paris (Pl.'s Opp. to Loews at 37).

The *RESTATEMENT (SECOND) OF CONTRACTS, section 205*, states "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement," and New York courts hold that the "implied covenant of fair dealing and good faith" is "implicit in all

contracts." *Van Valkenburgh, Nooger & Neville v. Hayden Publ'g Co., 30 N.Y.2d 34, 281 N.E.2d 142, 330 N.Y.S.2d 329, 333 (N.Y. 1972)* (citations omitted). Because the parties' conduct makes clear that there was an agreement between Six West and Loews, it follows that the agreement contained an implicit covenant of good faith and fair dealing, which required that Loews would exercise reasonable efforts in booking films at the Paris. Six West cites to no evidence that suggests this implied covenant was breached. Six West's conclusory assertions that certain films were played for too long or that the Paris failed to generate profits equivalent to the Angelika Theatre or Lincoln Plaza are insufficient for any rational juror to determine that [*61] Loews booked films for or operated the Paris in bad faith. (Pl.'s Opp. to Loews at 34-37).

Lastly, Six West's contention that Loews breached the Paris Agreement when it terminated its management of the theatre is equally unavailing. First, the Paris Agreement was of an indefinite duration and terminable at any time. See *Lake Erie Distribs. v. Martlet Importing Co., 221 A.D.2d 954, 634 N.Y.S.2d 599, 602 (4th Dep't 1995)*. Second, even if Six West's assertion that reasonable notice was required before terminating the relationship as a result of the parties' seven year relationship and the implied covenant of good faith and fair dealing, Loews' notice of its desire to terminate the relationship at the Paris five months prior to terminating the relationship requires a finding that reasonable notice was provided. (DX 107; DX 71; DX 106; DX 107; DX 110). See *Copy-Data Sys., Inc. v. Toshiba Am., Inc., 755 F.2d 293, 301 (2d Cir. 1985)* (requiring reasonable notice); *Colony Liquor Distrib., Inc. v. Jack Daniel Distillery, 22 A.D.2d 247, 254 N.Y.S.2d 547, 549-50 (3d Dep't 1964)* (same).

2. Breach of Fiduciary Duty Claims

Judge Edelstein [*62] held that Loews acted as Six West's agent and was Six West's fiduciary in some capacity, *Six West, 2000 U.S. Dist. LEXIS 2604, 2000 WL 264295,* at *6, and I agree that in operating the Paris Loews acted as Six West's agent. See *Mandelblatt v. Devon Stores, Inc., 132 A.D.2d 162, 521 N.Y.S.2d 672, 676 (1st Dep't 1987)* (Under New York law, "'a fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.'") (quoting *RESTATEMENT (SECOND) OF TORTS 874 cmt. a* (1979)); see also *Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1546 (S.D.N.Y. 1991)* (an agency relationship exists where the principal manifests an intent that the agent act on the principal's behalf, the agent accepts the undertaking, and the parties understand the principal is still in control). Thus, Loews owed Six West the general fiduciary duties of good faith and loyalty required of all agents. See *Elco Shoe Mfrs., Inc. v. Sisk, 260 N.Y. 100, 103-04 (1932).*

Despite Six West's numerous submissions, I hold that there is [*63] no genuine issue of material fact as to whether or not Loews breached its fiduciary duties. Six West has presented no facts to suggest that Loews' use of the Paris for movie premieres was in any way a violation of fiduciary duty. Similarly, conclusory statements that "it is clear that Loews mismanaged the Paris" and did not reasonably act to maximize profits at the Paris are clearly insufficient to support a claim for breach of fiduciary duties. (Pl.'s Opp. to Loews at 36-37). See *Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998)* ("Conclusory allegations, conjecture, and speculation, however, are insufficient to create a genuine issue of material fact.").

With respect to the termination of the relationship between Six West and Loews at the Paris, Six West alleges that termination involved a breach of fiduciary duties. (Pl.'s

Opp. to Loews at 38-39). As discussed above, the allegations made by Six West are insufficient to suggest that there was anything improper in the way Loews went about ceasing to operate the Paris. However, Six West makes the additional suggestion that the mere cessation of operation by Loews was a fiduciary breach. In an internal memorandum, [*64] Loews stated that it wished to terminate the Paris Agreement because:

> now that we have Lincoln Square, we would actually receive greater profits without the Paris Theatre, as many of the films that we now book at the Paris would instead play at Lincoln Square, as well as other [Loews] Theatres, where we keep all the profits.

(PX 143) (emphasis in original). Although fiduciaries are expected to act with nothing less than the "punctilio of an honor the most sensitive", *Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545 (1928)* (Cardozo, C.J.), even fiduciary duties cannot mandate that an individual or entity remain a fiduciary for an infinite duration or until the principal dismisses the fiduciary. A fiduciary may not maximize his or her own profits at the expense of the person or entity to whom a duty is owed, but fiduciary duties do not preclude the power of termination - even in order to maximize one's own profits - so long as termination is done in a fair and reasonable manner.

Six West also alleges that Loews breached its fiduciary duties by allegedly diverting the film Anna Karenina from the Paris to Loews' Sony Tower East theatre and usurping Six [*65] West's opportunity to purchase the film Belle de Jour by taking the film to Miramax in order to curry favor with the distributor. (Am. Compl. PP 67, 100). With regards to Anna Karenina, I do not find that any rational juror could infer a breach of fiduciary duty from the facts alleged by Six

West, and the theory that Loews took Belle de Jour to Miramax in order to curry favor is, on the record, no more than pure speculation. Six West's facts to support the notion that Loews took Belle de Jour to Miramax amount to Solow's deposition testimony that "I feel Mr. Brueggemann was a party to [taking the film to Miramax]," and "I think Mr. Brueggemann took my idea because they want to kiss Miramax's ring three times a day." (Solow Depo. 9/28/99 363:6-9). The only evidence Solow has to support these beliefs, however, is that Brueggemann once allegedly said "that's my coup," which Solow considered a "hint," while referring to Belle de Jour, (Solow Depo. 10/25/02 256:9, 257:15-16). Solow admits that he has no idea when Miramax might have begun negotiating for the film (Solow Depo. 10/25/02 257:7), and has no evidence other than the coincidental timing. At this stage [*66] in the litigation, such pure speculation is insufficient to bring the claim to a jury. See *Morris v. Lindau, 196 F.3d 102, 109 (2d Cir. 1999)* (to avoid summary judgment the non-moving party, "may not rely simply on conclusory allegations or speculation ..., but instead must offer evidence to show that [its] version of the events is not wholly fanciful.") (citation and internal quotation marks omitted).

3. Tortious Interference Claims

Tortious interference with business relations requires: (1) business relations with a third party; (2) the defendant's interference with those relations; (3) the defendant acting with the sole purpose of harming the plaintiff or using dishonest, unfair or improper means; and (4) injury to the business relationship. See *Nadel v. Play-by-Play Toys & Novelties, Inc., 208 F.3d 368, 382 (2d Cir. 2000)* (applying New York law). As discussed above, Six West has failed to proffer any cognizable evidence from which a jury could find any improper actions by Loews respecting Anna Karenina or Belle de Jour. Additionally, although Six West

need not have had a contractual relationship with a third party in order to maintain [*67] a claim for tortious interference, *PPX Enters. v. Audiofidelity Enters., 818 F.2d 266, 269 (2d Cir. 1987)*, Six West points to no evidence that it had any relationship with the third party that was selling Belle de Jour, and the suggestion that "but for" Loews' acts Six West would have entered into a contract to purchase the film is also unsupported by any evidence. See *Fine v. Dudley D. Doernberg & Co., Inc., 203 A.D.2d 419, 610 N.Y.S.2d 566, 567 (2d Dep't 1994)* (in an action for interference with prospective contractual relations there is a "but for" causation requirement that plaintiff would have received the contract but for the acts of the defendant).

For the above reasons, Six West's claims for breach of the Paris Agreement, breach of fiduciary duties, and tortious interference must fail.

C. The Festival

Similar to the situation at the Paris, no final written contract was ever executed for the operation and management of the Festival. (Loews Def.'s 56.1 Stmt P 80; Pl.' 56.1 Counterstmt to Loews P 80). Yet, like at the Paris, Six West's and Loews' course of conduct over four years makes clear that there was an agreement concerning the operation [*68] of the Festival between the parties (the "Festival Agreement").

Six West again proposes that despite the lack of a final written contract the parties agreed to numerous terms, and Loews agreed to be bound by certain obligations. However, Six West has proffered no evidence from which a jury could reasonably infer the existence of the obligations allegedly assumed by Loews. In his opinion, Judge Edelstein wrote that the Amended Complaint was "devoid of specific details governing the Festival Agreement," including the obligation to book certain types of films. *Six West, 2000 U.S. Dist.*

LEXIS 2604, 2000 WL 264295, at *8. Three years later, after extensive, and undoubtedly expensive, discovery Six West offers no more facts to suggest that Loews had an obligation to book particular types of films or, if such an obligation existed, breached that obligation.[15]

[*69]

Similarly, Six West's assertion that Loews had the obligation to maintain the Festival is wholly unsupported by the evidence. In particular, the undisputed fact that Solow agreed to pay fully for the renovation of the Festival, which never was undertaken, directly contradicts the contention that maintenance was ever intended by the parties to be Loews' responsibility under the agreement. (Loews Def.'s Br. at 45; DX 217 (May 13, 1994 letter from Locks to Solow ("You [Solow] will be upgrading the [Festival] theatre ... at no cost to Loews ...") (emphasis added))).

As evidence of contractual obligations assumed by Loews, Six West cites statements that Loews had promised to maximize profits or box office revenue at the Festival, (Pl.'s Opp. to Loews at 43 n.92; Pl.'s 56.1 Counterstmt. to Loews P 80(a)), and had promised to make more money than the previous operator, (Am. Compl. P 48). Such statements are too indefinite to create legally enforceable obligations. See *Landes v. Sullivan, 235 A.D.2d 657, 651 N.Y.S.2d 731, 734 (3d Dep't 1997)*. Regardless, Six West has not offered any evidence from which a jury could determine that Loews did not work to maximize [*70] profits at the Festival or breached the implied covenant of good faith and fair dealing.

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[15] Six West's contention that the parties' course of conduct is evidence of an obligation to book "art" or "specialty" films at the Festival is belied by the films actually booked at the Festival. (Pl.'s Opp. to Loews at 42, 46).

See *Van Valkenburgh, Nooger & Neville, 330 N.Y.S.2d at 333* (covenant of good faith and fair dealing is implied in every contract).

Again, the parties' course of conduct demonstrates that Loews was Six West's agent and fiduciary at the Festival, and therefore owed the requisite duties to the principal, Six West. See *Mandelblatt, 521 N.Y.S.2d at 676*. However, without evidence to support the allegations of breach of the Festival Agreement or any wrongdoing by Loews, no jury could find Loews liable for breach of its fiduciary duties at the Festival.

For the reasons stated above, Six West's claims for breach of the Festival Agreement and breach of fiduciary duties must fail.

IV. Six West's Claims Against the Individual Defendants

Because I grant summary judgment to the corporate defendants on Six West's underlying state claims lying in tort, breach of fiduciary duty and tortious interference, and federal claims for violation of the antitrust laws, Six West's claims against the Individual Defendants must also fail.

V. Six West's, the Sony Defendants' and [*71] the Loews Defendants' Motions In Limine to Exclude Expert Testimony

As I find that all claims against all defendants are without merit and subject to summary judgment, the parties' motions in limine to exclude expert testimony are deemed moot.

CONCLUSION

For the reasons stated above, defendants' motions for summary judgment (docket nos. 133 and 134) are granted, and plaintiff's complaint is dismissed. The Clerk of the Court

shall mark this action closed and all pending motions denied as moot.[16]

SO ORDERED
March 30, 2004
LORETTA A. PRESKA, U.S.D.J.

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[16] "Over? Did you say over? Nothing is over until we decide it is." National Lampoon's Animal House (Universal 1978).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 5499 (DNE)

SIX WEST RETAIL ACQUISITION, INC.,
Plaintiff,

v.

SONY THEATRE MANAGEMENT CORP.; LOEWS THEATRE MANAGEMENT CORP.; TALENT BOOKING AGENCY, INC.; LOEWS FINE ARTS CINEMAS, INC.; SONY PICTURES ENTERTAINMENT CORP.; SONY ELECTRONICS CORP.; SONY CORP.; JAMES LOEKS; BARRIE LAWSON LOEKS; TRAVIS REID; SEYMOUR H. SMITH; AND THOMAS BRUEGGEMANN,
Defendants.

DECIDED: March 8, 2000
FILED: March 9, 2000

2000 U.S. Dist. LEXIS 2604;
2000-1 Trade Cas. (CCH) P72,823

DISPOSITION: [*1] Defendants' Motion to Dismiss GRANTED with regard to Plaintiff's breach of contract claim against the Individual Defendants. Defendants' Motion to Dismiss DENIED in all other respects.

COUNSEL: For SIX WEST RETAIL ACQUISITION, INC., plaintiff: David Boies, Boies & Schiller LLP, Armonk, NY.

For SIX WEST RETAIL ACQUISITION, INC., plaintiff: David A. Barrett, Barrett Gravante Carpinello & Stern LLP, New York, NY.

For SONY THEATRE MANAGEMENT CORPORATION, LOEWS FINE ARTS CINEMAS, INC., SONY PICTURES ENTERTAINMENT CORPORATION, SONY ELECTRONICS CORPORATION, SONY CORPORATION, JAMES LOEKS, BARRIE LAWSON LOEKS, TRAVIS REID, THOMAS BRUEGGEMANN, TALENT BOOKING AGENCY, INC., defendants: Ira S. Sacks, Fried, Frank, Harris, Shriver & Jacobson, New York, NY.

For TALENT BOOKING AGENCY, INC., LOEWS FINE ARTS CINEMAS, INC., SEYMOUR H. SMITH, defendants: Ira S. Sacks, Fried, Frank, Harris, Shriver, New York, NY.

For TALENT BOOKING AGENCY, INC., counter-claimant: Ira S. Sacks, Fried, Frank, Harris, Shriver & Jacobson, Ira S. Sacks, Fried, Frank, Harris, Shriver, New York, NY.

For SIX WEST RETAIL ACQUISITION, INC., counter-defendant: David Boies, Boies & Schiller LLP, Armonk, NY.

For [*2] SIX WEST RETAIL ACQUISITION, INC., counter-defendant: David A. Barrett, Barrett Gravante Carpinello & Stern LLP, New York, NY.

JUDGES: David N. Edelstein, U.S.D.J.

OPINION BY: David N. Edelstein

OPINION:

OPINION & ORDER

In this action, Plaintiff alleges that Defendants breached various written and oral contracts existing between the parties regarding Defendants' management of three movie theatres that Plaintiff owned, breached fiduciary duties arising therefrom, tortiously interfered with Plaintiff's prospective business relations, and violated antitrust laws through the operation of Plaintiff's theatres and Defendants' participation in the film industry. Presently before this Court is Defendants' motion to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6).

At the heart of Plaintiff's claims is its alleged inability to compete for more profitable films to exhibit at its theatres. In the spirit of such Hollywood epics as Gone With the Wind, Ben Hur, The Ten Commandments, and Braveheart, this Court sets forth the following detailed opinion after fully contemplating all the complex and significant principles of law that the amended complaint implicates. [*3] [1]

Background

This matter reaches this Court framed as a Rule 12(b)(6) motion. Accordingly, the facts recited herein are drawn predominantly from Plaintiff's amended complaint.

I. Parties

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[1] "You're gonna need a bigger boat." Jaws (Universal 1975).

Plaintiff Six West Retail Acquisition, Inc. ("Six West" or "Plaintiff"), formerly Solow Theatre Corporation, is a New York corporation with its principal place of business in New York, New York. See Amended Compl. at PP 6, 34. Six West is the lessee and controller of: (1) the New York Twin (the "Twin"), a 1000-seat, two-screen movie theater located at 265 East 66th Street in New York City, (2) the Paris Theatre (the "Paris"), a 575-seat movie theatre located at 4 West 58th Street in New York City, and (3) the premises located at 6 West 57th Street in New York City, formerly the Festival Theatre (the "Festival"). See id. at PP 4, 6. Sheldon H. Solow ("Solow"), a New York City real estate developer, is the owner, the sole shareholder, and an officer [*4] of Plaintiff. See id. at PP 4, 6.

Defendant Loews Theatre Management Corporation ("Loews" or "Loews Theatres"), also known at various times as Sony Theatre Management Corporation ("Sony" or "Sony Theatres"), is a Delaware corporation with its principal place of business in New York, New York. Defendant Sony, also known at various times as Loews, is a Delaware corporation with its principal place of business in New York, New York. See id. at P 7.[2] Defendant Talent Booking Agency Inc. ("TBA") is a New York corporation with its principal place of business in New York, New York. See id. at P 9. TBA, originally a Loews Corporation subsidiary, is an affiliate of

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[2] In December 1986, through a series of stock purchases, Tri-Star Pictures, Inc. ("Tri-Star") acquired Loews Theatres. See Memorandum in Supp. of Defs.' Mot. to Dismiss the Am. Compl. ("Defendants' Mem.") at 7. In 1987, Tri-Star acquired Columbia Pictures Entertainment, Inc. and was renamed Columbia Pictures Entertainment, Inc. ("Columbia"). See id. Finally, in 1989, Columbia, through a series of transactions with Sony Corporation, became Sony Pictures Entertainment, Inc. See id. On July 29, 1994, Sony informed Six West that Loews had changed its name to Sony. See Amended Compl. at P 42.

Sony Theatres and its predecessors-in-interest. See id. at PP 9, 34. Defendant Loews Fine Arts Cinemas, Inc. ("Loews Fine Arts") is a New York Corporation with its principal place of business in New York, New York. See id. at P 10. Loews Fine Arts is a subsidiary of Sony Theatres through which Sony Theatres conducted business with the Paris and the Festival. See id. As used herein, the term "Sony" includes Defendants Sony Theatres, Loews Theatres, TBA, and Loews Fine Arts, all of which are allegedly the [*5] same entity or closely affiliated entities.

Defendant Sony Pictures Entertainment Corporation ("Sony Pictures"), a Delaware corporation, is the parent [3] company of Sony Theatres. See id. at P 11. Sony Pictures engages in the production and distribution of motion pictures, as well as the exhibition of movies through, among other companies, its subsidiary Sony Theatres. See id. Defendant Sony Electronics [*6] Corporation ("Sony Electronics"), a New York corporation, is the parent company of Sony Pictures. See id. at P 12. Defendant Sony Corporation, a Japanese corporation, is the ultimate parent company of Sony Electronics and the other Sony Defendants. See id. at P 13.[4]

Defendants James Loeks and Barrie Lawson Loeks ("Barrie Loeks"), formerly co-Chairpersons of Sony Theatres, are residents of Rye, New York. See id. at PP

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[3] "No. I am your father." The Empire Strikes Back (20th Century Fox 1980).

"Mother--what's the phrase? Isn't quite herself today." Psycho (Paramount 1960).

[4] This Court will hereinafter refer to Sony Pictures, Sony Electronics, and Sony Corporation collectively as the "Sony Corporate Entities."

14-15. Defendant Travis Reid, a resident of Saddle River, New Jersey, is President of Sony Theatres and TBA. See id. at P 16. Defendant Thomas Brueggmann, a resident of New York, New York, is Vice President of Sony Theatres. See id. at P 17. Defendant Seymour H. Smith, [*7] a resident of New York State, is the Executive Vice President of Sony Theatres and TBA. See id. at P 18.[5]

II. Facts

In this case, Plaintiff asserts both federal antitrust law and state law claims. The events and claims underlying this lawsuit arise from Defendants' operation of the three motion picture theatres that Plaintiff controlled and Defendants' alleged violations of the agreements with Plaintiff to run those theatres. Plaintiff describes in the amended complaint the details of the relationship between Plaintiff and Defendants regarding the management of Plaintiff's theatres. Plaintiff also contends that

> in operating plaintiff's theatres, Sony began to elevate its own interests over those of the plaintiff's theatres, in using plaintiff's theatres to curry favor with movie distributors purely for Sony's own advantage and to benefit Sony's own theatre operations. Sony's conduct has [*8] blatantly violated its contractual and fiduciary obligations to plaintiff.

Id. at P 50.

Thus, it is important to examine the nature of the agreements between the parties and in what manner Plaintiff claims Defendants violated those understandings. Moreover,

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[5] This Court will hereinafter refer to these corporate officers of Sony as the "Individual Defendants."

it is necessary to highlight Plaintiff's other allegations of Defendants' anti-competitive behavior.

A. Events Concerning the New York Twin

During the 1970s, Solow, who built the Twin, developed a close personal relationship with Bernard Myerson ("Myerson"), a senior executive of Loews Theatres.[6] See id. at P 33. On December 13, 1978, Solow Theatre Corporation, Plaintiff's predecessor-in-interest, entered into an agreement with TBA regarding the management and operation of the Twin (the "Twin Agreement"). See id. at P 34. The Twin Agreement expired on December 31, 1993, see Twin Agreement at § 2.01, but on July 14, 1992, Sony exercised an option to extend the duration of the agreement from January 1, 1994 to December 31, 2003. See Amended Compl. at P 42.

[*9]

Under the provisions of the Twin Agreement, Plaintiff was to receive sixty percent (60%) and the operator of the Twin was to receive forty percent (40%) of net theatre income after the deduction of expenses. See Twin Agreement at § 4.02. The Twin Agreement also provided:

> [TBA] agrees to operate the [Twin] as [a] prestige theatre[] showing neighborhood first-run motion pictures,[7] if available consistent with sound business practice, and in no event

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[6] "I think this is the beginning of a beautiful friendship." Casablanca (Warner Brothers 1942).

[7] When a film is released in a given locality it will have one or more "runs" at various movie theatres. "The critical run for a film is its first run. If a film's first run is not successful, it may have no . . . subsequent runs." Amended Compl. at P 30.

> dissimilar to other Loews Theatres in the greater New York Metropolitan area.

Twin Agreement at § 7.01.[8] Furthermore, under the terms of a Lease Agreement and a Four Party Agreement, TBA and Loews were committed to

> keep in the [Twin] and maintain in good condition and working order . . . all . . . projection equipment, sound equipment, ticket booth equipment, screens, drapery tracks, draperies, drapery motors, masking motors, carpeting, seats, aisle lights, lighting fixtures, concession equipment, lobby and lounge furniture and attraction signs and any other trade fixtures, equipment, decorations and furnishings, as shall be necessary or desirable for the efficient operation of the [Twin] as [*10] [a] first class motion picture theatre[].

Amended Compl. at P 41.

Still, the Twin Agreement also acknowledged that TBA had the obligation and exclusive right to book movies for exhibition at the Twin. The Twin Agreement stated:

> [Six West] acknowledges that [TBA] has not made and does not make any representation or warranty to [Six West] as to the manner of booking pictures for the [Twin], the clearance of motion [*11] pictures to be exhibited at the

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[8] Under the terms of a Lease Agreement and a Four Party Agreement that Solow, Solow Theatre Corporation, TBA, and Loews executed on December 13, 1978, contemporaneously with the Twin Agreement, TBA and Loews agreed to the same. See Amended Compl. at P 41; Affidavit of Rachel S. Fleishman ("Fleishman Aff.") at Ex. B.

> [Twin], the prices to be paid or charged for admission thereto, or whether pictures of a particular producer or distributor will be exhibited at the [Twin], all of which is specifically reserved to the sole discretion of [TBA].

Twin Agreement at § 7.01. The Twin Agreement also expressly noted that Plaintiff was aware that TBA's corporate affiliates, including Loews Theatres, operated several other movie theatres in Manhattan and declared that nothing in the Twin Agreement

> shall be deemed to prohibit or in any way impair the right of Loews Corporation, Loew's Theatres, Inc. or any of their subsidiaries (a) to acquire other motion picture theatres which may be competitive with [the Twin]; or (b) to operate its existing motion picture theatres in any way which in its sole judgment it shall determine.

Id. at § 7.02.

Because the Twin Agreement also prohibited Loews from assigning its interest in the Twin Agreement to an entity unaffiliated with Loews absent Plaintiff's consent, on July 3, 1985, in contemplation of Sony's predecessor-in-interest's acquisition of Loews, Loews and Solow entered into an agreement providing [*12] for Plaintiff's consent in exchange for specific covenants ("Consent and Covenant"). See Amended Compl. at PP 36-37; see also Fleishman Aff. at Ex. B. The parties have referred to the Twin Agreement and the Consent and Covenant collectively as the "Amended Twin Agreement." See Amended Compl. at P 38; Fleishman Aff. at P 3.

The Consent and Covenant underscored the special relationship between Solow and Myerson,[9] expressly conditioning Plaintiff's consent on Myerson's position as the "Chief Executive Officer of [TBA] . . . in charge of programming motion pictures for and the operation of the . . . Twin," and affording Solow an opportunity to disapprove of any successor to Myerson.[10] Fleishman Aff. at Ex. B. Moreover, while the Consent and Covenant extended the rights of § § 7.01 and 7.02 of the Twin Agreement to any successor to TBA by merger, the Consent and Covenant also stated that

> in the event a successor to Bernard Myerson is agreed upon, the Operator shall exhibit at the Loews New York Twin only first run motion pictures (or reissues distributed on a first run basis) of the type, quality and character equal to or better than motion pictures exhibited at [*13] the other theatres operated under the "Loews" name and situated on the east side of Manhattan
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> . . . .

Fleishman Aff. at Ex. B. Plaintiff asserts that this promise was "the core consideration for Solow's consent to the transfer of Loews' management of the Twin" from Myerson. Amended Compl. at P 38.

Plaintiff claims, however, that Defendants did not fulfill this obligation to play only first run films of equal or better

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[9] "You are my best friend. You're my only friend." The Frisco Kid (Warner Brothers 1979).

[10] "Strange, isn't it? Each man's life touches so many other lives--and when he isn't around he leaves an awful hole, doesn't he? . . . You see, George, you really had a wonderful life." It's a Wonderful Life (RKO 1946).

quality than the movies [11] shown at Defendants' other East Side theatres. Additionally, Plaintiff contends that Defendants violated the Amended Twin Agreement by booking poorly performing movies at the Twin, exhibiting movies at the Twin for a protracted period, and failing [*14] to maintain the physical condition of the Twin. See id. at PP 68-74. The amended complaint alleges a litany of specific violations.

First, Sony allegedly showed quality first run movies at its own East Side theatres, see id. at P 68, while "saddling [the Twin] with . . . a long list of undesirable [12] movies." Id. at P 71. According to Plaintiff, throughout 1995, Sony booked several allegedly unprofitable and sub-standard movies at the Twin, including Disclosure and I.Q. in late January and early February 1995; Tommy Boy in April 1995; My Family and Panther in May 1995; Free Willy 2 in July 1995; and Copycat and It Takes Two in December 1995. See id. at PP 68, 71. Between, August and November 1996, a similar pattern occurred when Sony exhibited the popular films A Time to Kill and The First Wives Club at the Sony Tower East theatre, [*15] while it booked a string of less profitable movies at the Twin, including Eraser, Harriet the Spy, and Joe's Apartment in August 1996; Grace of My Heart, She's the One, Infinity, and Giant in September and October 1996; and Dear God in November 1996. See id. at PP 70-71. In May and June 1997, Sony booked Night Falls on Manhattan at the Sony Tower East theatre, while showing

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[11] "I don't go to the movies much--if you've seen one, you've seen them all." Singin' in the Rain (Metro-Goldwyn-Mayer 1951).

[12] Mrs. Robinson: "Do you find me undesirable?"

Ben Braddock: "Oh, no. I think you're the most attractive of my parents' friends." The Graduate (United Artists 1967).

the sub-par movies Father's Day and Brassed Off at the Twin. See id. at P 70. Furthermore, while Sony showed Emma at the Sony Lincoln Square theatre and the Cineplex Odeon ("Cineplex") Beekman theatre [13] for a ten-week run, it booked in the Twin "a series of utter failures . . . all of which failed to earn any profit whatever for the New York Twin," including Harriet the Spy; Joe's Apartment; Eraser; Cold Comfort Farm, a second-run film; A Very Brady Sequel; Grace of My Heart; and Infinity. Id. at P 69.

[*16]

Second, Plaintiff asserts that Sony exhibited films at the Twin for an extended period of time, causing box office receipts to decline. See id. at P 72. For example, Sony booked the initially profitable Face Off at the Twin for twelve weeks in 1997, including a six week stint at both Twin theatres, despite sharply declining gross receipts. See id. Moreover, during the last three weeks of its Twin run, Sony did not show Face Off at any of its own theatres. See id.

Third, Plaintiff contends that Sony habitually "'cherry-picked' hit movies by opening them at theatres where it receives 100 percent of the profits and then, after several weeks, moving them to the Twin (where Sony gets only 40 percent of the profits) when their revenue-generating potential has declined." Id.

Fourth, Sony allegedly has not operated [*17] the Twin theatres "as prestige theatres," as required under the Amended Twin Agreement. Twin Agreement at § 7.01. In

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[13] Showing Emma, an allegedly popular film, at Cineplex's Beekman theatre benefitted Cineplex, Sony's future merger partner. Pursuant to the merger settlement permitting consummation of the merger, see infra part IV., Cineplex divested itself of the Beekman.

particular, Plaintiff argues that "Sony has failed to provide the Twin with modern equipment such as digital sound capacity and allowed the physical condition of the Twin to deteriorate markedly." Id. at P 73. Plaintiff also claims that Sony has obstructed Plaintiff's efforts "to undertake basic and necessary repairs and refurbishment of the New York Twin." Id.

B. Events Concerning the Paris Theatre [14]

In 1990, Solow, on behalf of Six West, began to operate the Paris Theatre, allegedly one of the country's most prestigious theatres and one recognized as a top premiere venue. See id. at PP 43, 51. Shortly thereafter, Sony commenced management of the Paris for Plaintiff pursuant to a financial arrangement similar to that for the Twin. See id. at P 43. After the payment of all operating expenses, Plaintiff received [*18] the first $ 200,000 of net income each year and the parties divided the remainder, sixty percent (60%) for Plaintiff and forty percent (40%) for Sony. See id.

The amended complaint does not define the responsibilities of the parties or the parameters of the working relationship between them regarding the Paris. While the parties did exchange drafts of written management agreements over the course of several years, none were ever signed. Still, Plaintiff contends that the parties effectively acted pursuant to two letter agreements--an October 1, 1993 proposal [15] that Solow presented and a May 18, 1994 proposal that Loews Fine Arts offered. See id. at P 44.

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[14] "We'll always have Paris." Casablanca (Warner Brothers 1942).

[15] "I'll make him an offer he can't refuse." The Godfather (Paramount 1972).

Plaintiff asserts that these two proposals "contain provisions that are largely compatible," id., and refers to them as the "Paris Agreement." Id. at P 45. Plaintiff also maintains that "before the breaches by Sony, the parties conducted themselves in accordance with [*19] those mutual understandings." Id. at P 44. This Court, however, recognizes certain key differences between the two proposals.[16]

While Solow's letter states, "Operator shall manage and operate the Theatre in accordance with the same standards as it manages and operates other Loews Theatres in the City of New York," Fleishman Aff. at Ex. C, the Loews Fine Arts letter reads, "Operator shall manage and operate the Theatre substantially in accordance with the same standards that it manages and operates other Loews Theatres in the Borough of Manhattan." Id. at Ex. D (emphasis added). Furthermore, while both proposals agree that "Operator shall be deemed to be acting in a fiduciary capacity for the benefit of Owner," id. at Exs. C, D, the Loews Fine Arts letter qualifies that acknowledgment by adding the [*20] words "subject to the provisions of Paragraph 7 hereof." Id. at Ex. D. Paragraph 7 of the Loews Fine Arts letter provides:

> Owner has been advised and acknowledges that Operator and its affiliates are involved in, and may increase involvement in, numerous aspects of the motion picture industry, including the production and distribution of motion picture films for exhibition in motion picture theatres and the ownership, operation or management of

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[16] In considering a motion to dismiss, a court may look at documents incorporated in the complaint by reference. See Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir. 1991).

> other motion picture theatres. Owner has been advised that Columbia Pictures, Tri-Star Pictures, Sony Picture Classics and Triumph Releasing Corporation are affiliates of Operator. Owner has been further advised that Operator now operates [other theatres], and that affiliates of Operator contemplate the opening of a 12-auditoria theatre plus an IMAX Theatre at Lincoln Square at 67th Street and Broadway in Manhattan in November 1994. Owner recognizes that these operations may result in actual or potential conflicts of interest, and conflicts of interest shall not in and of itself [sic] constitute a basis for any claim by Owner against Operator or any of its affiliates.

Id.

This, even considering the two letter agreements, [*21] the details of the arrangement between Plaintiff and Sony regarding the Paris are still unknown. Nevertheless, despite discrepancies between the two letters and the amended complaint's lack of detail regarding the terms under which Sony managed the Paris, Sony unquestionably did indeed operate the Paris beginning in 1990, acting as Plaintiff's agent and, thereby, Plaintiff's fiduciary in some capacity. In fact, "upon its takeover of the Paris in 1990, and before the letter agreements were drafted, Loews Theatres publicly announced its agreement to operate the Paris and professed its commitment[] to maintaining the 'upscale nature' and traditional policies of the Paris," which included a longstanding policy of exclusive bookings. Amended Compl. at PP 44, 66. Moreover, in April 1996, in a discussion with Plaintiff, Defendant Barrie Loeks emphasized the importance of sustaining the prestige of the Paris and of exclusive bookings to preserve the theatre's stature, assuring Plaintiff that "before a film [would be] booked for the [Paris] Theatre,

[Sony would] have a written agreement with the distributor that the film [would] run exclusively at the Paris." Id. at P 59.

Plaintiff [*22] asserts that Defendants violated the arrangement regarding the Paris Theatre and the aforementioned guarantees that Defendants made to Plaintiff by premiering movies at the Paris, affording the benefit of the Paris's prestige to those movies and their distributors, and then refusing to continue to show those films at the Paris or Plaintiff's other theatres; exhibiting movies at the Paris for a protracted period; and ignoring prior guarantees to continue the Paris's history of exclusive bookings while diverting successful films to its Lincoln Square theatre for exclusive and non-exclusive runs. See id. at PP 51-67. Plaintiff specifically alleges a long list of violations.

First, Plaintiff maintains that "Sony abused the special reputation and quality of the Paris Theatre, premiering top quality films there for minimal fees and then failing to exhibit those films at any of plaintiff's theatres . . . currying favor with certain distributors, with no benefit to plaintiff." Id. at P 51. Plaintiff insists, however, that Sony did show those films at its own theatres. For example, Sony arranged for the premiere of Emma, produced by the distributor Miramax, at the Paris in April [*23] 1996, benefitting Miramax and strengthening Sony's relationship with Miramax. See id. at P 52. Thereafter, Emma did not play at any of Plaintiff's theatres but rather at the Sony Lincoln Square theatre and the theatre formerly known as the Cineplex Beekman. See id. Sony also helped plan the premiere of The First Wives Club, a popular and successful Paramount production, at the Paris in September 1996, enhancing Sony's relationship with Paramount while conferring no benefit onto Plaintiff. See id. at P 53. The First Wives Club then played at, among other theatres, the Sony Tower East, but not at the Paris. See id. Further, Sony

arranged these premieres without Plaintiff's consent, allegedly in violation of the Paris Agreement, which required Plaintiff's consent for such showings. See id. at P 54. [17]

[*24]

Second, Plaintiff alleges that "Sony . . . failed to book appropriate films for the Paris, in violation of its contractual and fiduciary obligations, and often extended for an unreasonable duration the exhibition of under-performing motion pictures." Id. at P 58. Furthermore, Plaintiff agrees that while "Sony[] refused to exhibit suitable, high quality motion pictures at the Paris for an extended period," id. at P 51, "Sony exhibited a number of motion pictures on an exclusive basis at its own Lincoln Square facility." Id. at P 58. For instance, in July 1996, when Sony informed Plaintiff that it would be unable to exhibit The Garden of the Finzi-Continis at the Paris until 1997 "because of difficulty in getting the materials from Italy," id. at P 61, Sony continued to show Purple Noon, "an underperformer," for a prolonged run at the Paris. Id. at P 62. Sony claimed that it would be unable to obtain an alternative to book at the Paris until Surviving Picasso would open in late September 1996. See id. Plaintiff later learned that during the extended run of Purple Noon, Sony could have booked The Spitfire Grill exclusively at the Paris. [*25] See id. [18] Also in 1996, after reneging on its representation to Plaintiff to exhibit The

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[17] The two letter agreements of October 1, 1993 and May 18, 1994 both contain the provision: "Operator shall not enter into any so-called '4-wall deals' without the prior approval of Owner." See Fleishman Aff. at Exs. C, D. A movie premiere is "a form of 'four wall deal' in which the theatre is rented out at a set price for a set period of time." See Amended Compl. at P 54.

[18] Columbia, a close affiliate of Sony, distributed The Spitfire Grill. See id.

English Patient for an exclusive run at the Paris, Sony continued to show the four hour long Hamlet at the Paris "for an inordinately long run." Id. at P 65.

Third, despite guarantees from Defendant Barrie Loeks to continue the tradition of exclusive bookings at the Paris, Sony, allegedly in an effort to promote its own relations with distributors, "attempted to bully plaintiff into departing from the Paris Theatre's traditional exclusive booking policy." Id. at PP 60, 66. In June 1996, Defendant Thomas Brueggmann informed Solow that Sony was negotiating to exhibit several movies at the Paris on a non-exclusive basis. See id. at P 60. Additionally, in a letter dated August 15, 1996, Defendant Travis Reid "expressly threatened that Sony would book the movies Hamlet, Surviving Picasso and The English Patient [*26] at the Sony Lincoln Square theatre instead of the Paris Theatre unless plaintiff accepted downtown showings of those movies in a departure from the Paris Theatre's longstanding exclusivity policy." Id. at P 66.

Fourth, Plaintiff alleges that while claiming an inability to locate films for exclusive showings at the Paris, Sony repeatedly diverted the exhibition of quality films from the Paris to its own theatres, including the Sony Lincoln Square theatre. Plaintiff speculates that "because Sony made such an extraordinarily large investment in the Sony Lincoln Square theatre complex, it was willing to breach its obligations to plaintiff in order to advance Lincoln Square's competitive position." Id. at P 64. For example, in 1996, when Sony did not fulfill its commitment to book The English Patient exclusively at the Paris, it instead played The English Patient at the Sony Lincoln Square complex. See id. at P 65. Moreover, when Sony failed to inform Plaintiff of the availability of The Spitfire Grill to replace Purple Moon at the Paris, Sony opened The Spitfire Grill for an exclusive run at the Sony Lincoln Square theatre. See id. at P 62.

Finally, [*27] before Sony unilaterally terminated its operation of the Paris in 1997, Plaintiff requested that Sony continue to manage the Paris for another month and to continue to show Anna Karenina ("Anna") at the Paris. See id. at P 67. Plaintiff asserts that "Sony refused to do so unless plaintiff agreed to release Sony from all potential claims arising from its management of the Paris." Id. Plaintiff claims that when it rebuffed Sony's condition, "Sony intentionally induced the distributor Warner Brothers . . . to decide not to continue to exhibit Anna at the Paris Theatre, as previously arranged, and instead to move it to the Sony Tower East theatre in February 1997." Id. Ultimately, Sony's alleged attempts to decrease or even eliminate competition for its theatres, especially the Sony Lincoln Square complex, were successful when Plaintiff's failure to obtain quality films to book at the Paris purportedly forced Plaintiff to close the Paris for a lengthy period. See id. at P 64. [19]

[*28]

C. Events Concerning the Festival Theatre

At the time Sony assumed operation of the Paris, it also publicly announced its management of the Festival. See id. at P 47. Plaintiff and Sony acted "on the same terms that governed the Paris, except that Plaintiff received no priority payment of net income (the 'Festival Agreement')." See id.

The amended complaint is devoid of specific details governing the Festival Agreement. According to Plaintiff, however, it was the understanding of the parties that Sony was Plaintiff's agent and undertook fiduciary obligations pursuant to that relationship. See id. Additionally, the

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[19] The amended complaint does not state when or for how long Plaintiff closed the Paris.

amended complaint states that "in negotiating to manage the Festival Theatre, Sony represented that it could make more money than the previous operator of the theatre and that it would improve the physical condition and quality of films shown at the Festival." Id. at P 48. [20] Plaintiff argues that notwithstanding these assurances, "Sony grossly mismanaged the Festival Theatre and allowed its profitability and physical appearance to deteriorate dramatically." Id. at P 75.

[*29]

First, Plaintiff alleges that "the Festival was being used as a 'dumping ground' for inferior film product," causing the theatre's reputation to deteriorate. Id. at P 77. Thus, while the Festival was profitable during the last six months of 1990, the initial period of Sony's management, the Festival lost money from 1991 until 1994, when it closed permanently. See id. at P 75. In fact, "the Festival's annual gross receipts from ticket sales under Sony's management were only about one-half or less than the amounts recorded in 1989, the last full year prior to Sony's takeover." Id.

Second, Plaintiff claims "Sony incurred unnecessary expenses in operating the Festival," by overstaffing the Festival after attendance decreased, without justification for the increase in personnel. Id. at P 76. "Indeed, in 1992 and 1993, employee salaries and benefits alone substantially exceeded gross box office revenues." Id.

Third, Plaintiff states that Sony permitted the physical condition of the theatre to fall into utter disrepair. See id. at PP 76-77. The Festival became so unsuitable and squalid that

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[20] The amended complaint does not, however, mention the profitability of or describe the appearance of the Festival prior to Sony's assumption of management.

on December 26, 1993, the New York Times quoted a movie industry executive [*30] who said the following about the Festival: "It's a pig sty. Every other seat is broken. It smells like rat poison. It looks like Dresden." Id. at P 77. Ultimately, in 1994, Plaintiff closed the Festival, citing Sony's inept management, Sony's estimates of the expenditures necessary to refurbish and upgrade the Festival--of which Plaintiff was responsible for sixty percent pursuant to the Festival Agreement--and the Festival's declining reputation. See id. at PP 75, 77.

In sum, Plaintiff maintains that

> Sony's actions in showing second-run movies, poorly performing movies and insisting on overlong runs, combined with Sony's intentional neglect of the theatres' equipment and physical condition, have seriously impaired the image of [Plaintiff's three theatres]. Sony's improper film choices and failure to maintain [Plaintiffs' theatres] violate the [agreements between Plaintiff and Sony], Sony's implied duty of good faith and fair dealing and Sony's fiduciary duties. Sony intended these violations to advance its own business interests and monopolistic and anti-competitive objectives, all to the detriment of plaintiff.

Id. at P 74.

D. Other Allegations [*31] Demonstrating Sony's Anti-competitive Behavior

To substantiate the claim that Sony advanced its own business interests over Plaintiff's, the amended complaint also describes several other actions that Defendants undertook. In 1995, when Sony claimed to be having trouble booking an appropriate movie for exhibition at the Paris,

Solow asked Defendant Brueggemann to research the possibility of leasing Belle de Jour, ("Belle"), a classic 1967 film. See id. at P 55. After making some inquiries, Defendant Brueggemann informed Solow that the owner of the rights to Belle would consider only selling the rights, not leasing. See id. at P 56. Solow then directed Defendant Brueggemann to determine the cost of the rights to facilitate Plaintiff's purchase of the movie. See id. Plaintiff contends that "rather than pursuing Mr. Solow's request as agent for plaintiff, Mr. Brueggemann suggested the concept to Miramax, which subsequently bought and re-released Belle de Jour [at the Paris] with great success." Id. at P 57. An advertisement in Variety stated that in its first week at the Paris, Belle grossed over $ 100,000, at that time, "history's highest grossing [*32] foreign language film on a single screen." Id. Plaintiff argues that Defendants Brueggemann and Sony thereby intended "to curry favor with Miramax [and] effectively deprive[] plaintiff of a substantial business opportunity." Id.

Additionally, Plaintiff alleges that Sony engaged in a series of block-booking agreements with distributors, limiting the availability of motion pictures to independent theatre owners and reducing competition. See id. at P 78. Block-booking, a per se violation of the antitrust laws, is an illegal practice [21] through which film distributors condition the license or sale of their movies on the acceptance of unwanted or inferior films. See United States v. Paramount Pictures, Inc., 334 U.S. 131, 156, 92 L. Ed. 1260, 68 S. Ct. 915 (1948). [22] Plaintiff claims that Sony's correspondence

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[21] "Damn it all, why is everything we're good at illegal?" Butch Cassidy and the Sundance Kid (20th Century Fox 1969).

[22] For a brief general history of the Paramount case see United States v. Loew's Inc., 705 F. Supp. 878, 880-81 (S.D.N.Y. 1988). In particular, this Court notes that the Supreme Court found the Paramount

(continued...)

with Plaintiff, answering Plaintiff's dissatisfaction about the films Sony exhibited at Plaintiff's theatres, demonstrates Sony's "pattern of blatantly anticompetitive conduct." Amended Compl. at P 78.

[*33]

In a January 16, 1996 letter to Solow explaining why Sony made no effort to obtain Sense and Sensibility, a [*34] Sony Pictures' release, to play at the Twin, Defendant Reid wrote,

> if we were to decide to attempt to change our relationships on the east side of New York this business does not work in such a way that we would only play Sense and Sensibility, but that we would become obligated to play a full portion of the Sony Pictures release schedule.

Id. at P 80. In an August 15, 1996 letter to Solow, Defendant Reid stated that it is

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(...continued)
defendants, eight studios that owned production, distribution, and exhibition facilities and dominated and controlled the movie industry, guilty of restraining and monopolizing the distribution and exhibition of films in violation of § § 1 and 2 of the Sherman Act. Id. at 880 (citations omitted). A series of consent judgments followed, prohibiting the Paramount defendants, most significantly:

> From licensing any features for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others.

Id. at 881 (citation omitted)(emphasis added).

> necessary to form relationships in order to be booked properly on a long term basis. Our relationships on the East side are with Paramount, Warner Brothers and Gramercy. Harriet the Spy (Paramount) was released by the same company that has this year given the Twin Mission Impossible and Primal Fear . . . . Similarly, Joe's Apartment (Warner Brothers) was released by the same company that gave us Heat and Eraser . . . .

Id. at P 79 (alterations in original). On September 19, 1996, Defendant Reid sent another letter to Solow that detailed the booking practices that at least some distributors desire to have with exhibitors, writing: "In order for distributors to be certain of proper placement in [*35] this zone [the East Side of Manhattan], they make long term relationships with one or two of these exhibitors who agree to participate in the liquidation of all their product, not just high profile films . . . ." Id. at P 81. Plaintiff asserts that these letters "constitute an admission of block-booking agreements between Sony and [various] distributors," id. at P 79, that "makes it unreasonably difficult for an independent theatre owner to compete for high quality motion pictures." Id. at P 81.

Plaintiff further asserts that Sony resented Plaintiff's discontent with Sony's booking arrangements at Plaintiff's theatres. Plaintiff alleges that Defendant Reid "adopted a peremptory, adversarial and threatening tone in communicating with plaintiff." Id. at P 83. For example, in an October 7, 1996 letter to Plaintiff, Defendant Reid wrote "The Management Agreement for the New York Twin does not require Sony Theatres to discuss individual bookings

with you, and it is not my intention to do so." Id. [23] Furthermore, in late 1996, when Plaintiff indicated that it may terminate Sony as manager of Plaintiff's theatres, Defendant Reid "threatened that he and the other [*36] defendants would make every effort to influence distributors not to deliver quality films to Plaintiff's theatres." Id. at P 84. Plaintiff asserts that Sony was motivated by the many millions of dollars that it expended to build the Lincoln Square complex, [24] maintaining that "eliminating competition by precipitating the demise" of Plaintiff's theatres was a "strong incentive to ensure Lincoln Square's success." Id. at P 85.

Finally, shortly before Plaintiff filed its amended complaint, Sony announced an intention "to merge its operations--which include the largest movie theatre chain in Manhattan--with the Cineplex Odeon chain--Manhattan's second largest theatre operator." Id. at P 3. On September 30, 1997, Loews and Cineplex entered into a merger agreement, making Cineplex a wholly owned subsidiary of Loews and creating [*37] the company Loews Cineplex Entertainment Corporation ("LCE"). See Proposed Final Judgment and Competitive Impact Statement, 98-CIV-2716, 63 Fed. Reg. 25071, 25076 (May 6, 1998). The parties finally consummated the merger pursuant to a settlement requiring the divestiture of various Loews and Cineplex movie theatres in Manhattan and Chicago. See id. Plaintiff alleges that the merger between Sony and Cineplex demonstrates Sony's monopolistic intent and violates the antitrust laws. See Amended Compl. at PP 3, 127-131.

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[23] "Frankly, my dear, I don't give a damn." Gone with the Wind (Selznick-Metro-Goldwyn-Mayer 1939).

[24] "If you build it, he will come." Field of Dreams (Universal 1989).

III. Procedural History

On July 24, 1997, Plaintiff commenced the instant litigation by filing a complaint. Thereafter, on October 14, 1997, this Court held a pretrial conference [25] at which this Court granted Plaintiff permission to amend its complaint to add a Clayton Act § 7 claim. On December 4, 1997, Plaintiff filed an amended complaint asserting seven federal and state claims against Defendants: (1) breach of contract; (2) breach of fiduciary duty; (3) tortious interference with prospective business relations; (4) unjust enrichment; (5) block-booking agreements in restraint of trade in violation of § 1 of the Sherman Act ("§ 1"), [*38] 15 U.S.C. § 1; (6) attempted monopolization in violation of § 2 of the Sherman Act ("§ 2"), 15 U.S.C. § 2; and (7) merger violations of § 7 of the Clayton Act ("§ 7"), 15 U.S.C. § 18. See id. at PP 86-131.

On January 8, 1998, Defendants filed a motion to dismiss the amended complaint pursuant to Rule 12(b)(6). Submissions from both parties followed. This Court agreed to table the motion to dismiss while the parties attempted to narrow the scope of the claims to be tried while simultaneously pursuing discovery. Based on correspondence from the parties in February 1999, however, this Court concluded that the parties were unable to consensually narrow the issues or to amicably complete discovery. See Letter from David Boies, attorney for Plaintiff, to Judge David N. Edelstein of 2/1/99; Letter from Ira S. Sacks, attorney for [*39] Defendants, to Judge David N. Edelstein of 2/8/99 ("Sacks Letter"). At that point, this Court determined that it was necessary to consider the motion to dismiss. Then, on March 8, 1999, Defendants

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[25] "Why don't you come up sometime, see me? Come up, I'll tell your fortune." She Done Him Wrong (Paramount 1933).

brought a motion requesting that this Court take judicial notice of certain adjudicative facts that occurred after Defendants briefed the motion to dismiss. See infra part IV. Submissions from both parties followed.

Discussion

This Court now [26] turns to the claims Plaintiff raises in the amended complaint. Before resolving these issues, this Court will first set forth the legal standards that govern the instant Opinion and Order.

IV. Relevant Standards

The appropriate legal standards for purposes of this Opinion and Order [27] are those that control: (1) a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), and (2) a party's [*40] request that a court take judicial notice of supplemental material pursuant to Federal Rule of Evidence 201(b) ("Rule of Evid. 201(b)").

A. Motion to Dismiss

In evaluating whether a complaint will withstand a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, a court must assume the truth [28] of a plaintiff's "well-pleaded allegations." Albright v. Oliver, 510 U.S. 266, 268, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994); LaBounty v. Adler, 933 F.2d 121, 123 (2d Cir. 1991). The

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[26] "What we need right now is a stupid, futile gesture on someone's part" National Lampoon's Animal House (Universal 1978).

[27] "You're out of order. You're out of order. The whole trial is out of order." And Justice For All (Columbia 1979).

[28] "You can't handle the truth." A Few Good Men (Columbia 1992).

court also must read the complaint generously and draw reasonable inferences in favor of the pleader. See LaBounty, 933 F.2d at 123. A court's function is "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980); [*41] accord Ricciuti v. New York City Transit Auth., 941 F.2d 119, 124 (2d Cir. 1991). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). Thus, a court will not dismiss a complaint unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief requested. See Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984); Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); Branum v. Clark, 927 F.2d 698, 705 (2d Cir. 1991).

In the context of an antitrust complaint, the standard is even more rigorous. The Supreme Court has stated that "in antitrust cases, where 'the proof is [*42] largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." Hospital Bldg. Co. v. Trustees of the Rex Hosp., 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976)(quoting Poller v. Columbia Broadcasting, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)). This Court, therefore, will not dismiss any of the antitrust charges in the amended complaint that include "a short plain statement of the claim," Rule 8(a)(2), that "adequately . . . define[s] the relevant product market, . . . allege[s] antitrust injury, [and] . . . allege[s] conduct in violation of the antitrust laws." Re-Alco Indus., Inc. v. National Center for Health Educ., Inc., 812 F. Supp. 387, 391 (S.D.N.Y. 1993).

When reviewing the pleadings on a motion to dismiss pursuant to Rule 12(b)(6), a court looks only to the four corners of the complaint and evaluates the legal viability of the allegations contained therein. See Fed. R. Civ. P. 12(b)(6); Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991); Kramer, 937 F.2d at 773. [*43] "[A] district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference." Kramer, 937 F.2d at 773; accord Kopec v. Coughlin III, 922 F.2d 152, 155-56 (2d Cir. 1991); Fonte v. Board of Managers of Continental Towers Condominium, 848 F.2d 24, 25 (2d Cir. 1988). If a court wishes to consider material outside the pleadings, it must convert the motion to dismiss into one for summary judgment under Rule 56. See Kramer, 937 F.2d at 773; Kopec, 922 F.2d at 155-56; Fonte, 848 F.2d at 25.

B. Judicial Notice

Defendants petition this Court to look beyond the amended complaint to consider certain relevant facts that occurred after its filing. On April 16, 1998, the United States, the State of New York, and the State of Illinois filed a civil antitrust action in the United States District Court for the Southern District of New York against Loews, Cineplex, Sony Corporation America, and J.E. Seagram Corporation alleging that the merger, then pending, of Loews and Cineplex would violate § 7 of the [*44] Clayton Act. Defendants ask this Court [29] to take judicial notice that on that same date, April 16, 1998, the parties to that action entered into a settlement requiring Loews and Cineplex to divest themselves of a total of fourteen movie theatres in

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[29] "There's only one question you should ask yourself: 'Do I feel lucky?' Well, do you, punk?" Dirty Harry (Warner Brothers 1971).

Manhattan--one Loews theatre and thirteen Cineplex theatres. See Memorandum in Supp. of Defs.' Request that the Court take Judicial Notice of Certain Adjudicative Facts ("Defendants' Judicial Notice Mem."); see also Proposed Final Judgment and Competitive Impact Statement ("Stipulation and Order"), 98-CIV-2716, 63 Fed. Reg. 25071, 25076 (May 6, 1998). In particular, Defendants want this Court to recognize that the Stipulation and Order explained that "the divested theatres constituted slightly more in box office revenue in Manhattan . . . than the [merged entity, LCE] . . . acquired in [the Manhattan] market and, as a result . . . reduced the [merged entity's] share back to (or actually slightly less than) pre-merger levels . . . ." Defendants' Judicial Notice Mem. at 2 (quoting Stipulation and Order at 25078). "Stated differently, as a result of the Stipulation and Order requiring Loews and Cineplex to divest [*45] a total of fourteen (14) first-run theatres in Manhattan, LCE operates the same number of theatres as Loews alone operated prior to the merger." Reply Br. in Supp. of Defs. Request that the Court Take Judicial Notice of Certain Adjudicative Facts at 2.

"A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." International Star Class Yacht Racing Assoc. v. Tommy Hilfiger U.S.A., Inc., 146 F.3d 66, 70 (2d Cir. 1998)(citation and internal quotations omitted); see also Kramer, 937 F.2d at 774 (stating that documents filed with the SEC "are relevant not to prove the truth of their contents but only to determine what the documents stated"). Thus, this Court may recognize that the Government and the States [*46] of New York and Illinois did bring a civil antitrust suit against Defendant Loews with regard to its merger with Cineplex. This Court may also notice that the parties entered into a Stipulation and Order

directing Loews and Cineplex to dispossess certain theatres. It would be improper, however, for this Court to accept as true any of the statements, allegations, or agreements contained in the Stipulation and Order that do not comply with the standard set forth in Rule of Evid. 201(b).

Rule of Evid. 201(b) permits a court to take judicial notice of facts "not subject to reasonable dispute." Fed. R. Evid. 201(b). Such facts must either be "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Id. The Second Circuit stated that "facts adjudicated in a prior case do not meet either test of indisputability contained in Rule 201(b): they are not usually common knowledge, nor are they derived from an unimpeachable source." International Star Class, 146 F.3d at 70 (citation omitted). Here, Defendants effectively want this Court [*47] to acknowledge that as a result of compliance with the Stipulation and Order the size of Loews' share of the movie exhibition market in Manhattan remains unchanged since the merger. This Court may not glean this information from the Stipulation and Order because to do so would be to rely on facts decided in a prior case.

Nevertheless, in support of this request, Defendants submitted copies of the April 2, 1998 and April 3, 1998 New York Times advertisement for Loews Theatres showing that Loews operated ten theatres in Manhattan. See Affidavit of Ira S. Sacks in Supp. of Defs.' Request that the Court take Judicial Notice of Certain Adjudicative Facts at Exs. A, B. Defendants also offered an excerpt from the March 18, 1999 New York Times, confirming that the merged entity, LCE, managed the same number of theatres after the divestiture. See id. at Ex. C. By relying on the citations from the New York Times, "whose accuracy cannot reasonably be questioned," Fed. R. Evid. 201(b), this Court can accept that

Loews, now known as LCE, operates the same number of theatres that it did prior to the merger.[30]

[*48]

V. Federal Law Claims

Principles of supplemental jurisdiction allow this Court to analyze the sufficiency of both Plaintiff's federal and state claims. See 28 U.S.C. § 1367(a). This Court has original jurisdiction over Plaintiff's antitrust claims and may exercise jurisdiction over Plaintiff's state claims as they are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." Id. Because 28 U.S.C. § 1367 also directs that a court may decline to exercise jurisdiction over state law claims if the court has dismissed all federal claims, this Court will first examine the adequacy of Plaintiff's federal antitrust claims.

A. Sherman Act § 1 Claims: Agreements in Restraint of Trade

Plaintiff frames its § 1 claim as a block-booking claim against Defendants. After carefully reviewing and sorting through the amended complaint, this Court finds that Plaintiff's § 1 claim, though somewhat mixed up and

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[30] Although Defendants failed to comply with this Court's Individual Rules requiring that they seek a pre-motion conference before submitting their motion or asking this Court for special permission to file such a motion, see Individual Rules of Judge David N. Edelstein 2.A., it would be remiss for this Court to reject the motion in view of the significance of the facts detailed therein. It would be futile and illogical for this Court to analyze the individual pre-merger market share of movie theatres that Loews possessed in Manhattan and speculate as to its potential market share if merged with Cineplex, disregarding that Loews and Cineplex have already actually merged into LCE.

imprecise, may stand either as a block-booking claim against Defendant Sony Pictures and the other Sony Corporate Entities or as an illegal relationship licensing claim [*49] against all of the Sony Defendants. Discovery, therefore, may proceed on both claims.

1. Block-booking

In the landmark case United States v. Paramount Pictures, Inc., the Supreme Court defined block-booking as "the practice of licensing, or offering for license, one feature or group of features on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period." 334 U.S. at 156. As such, block-booking is a type of tying arrangement, see Fields Prods., Inc. v. United Artists Corp., 318 F. Supp. 87, 88 (S.D.N.Y. 1969); aff'd 432 F.2d 1010 (2d Cir. 1970), which is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). Block-booking violates § 1 because distributors force theatres to accept films that they do not desire and, thereby, prevent other exhibitors from access to those movies, while at the same time depriving competing distributors of an opportunity to license their own [*50] movies to the coerced theatres. Fields, 318 F. Supp. at 88. The Supreme Court held that block-booking is inimical to the antitrust laws because it "prevents competitors from bidding for single features on their individual merits." Paramount, 334 U.S. at 156-57. As recently as 1989, the Second Circuit found that block-booking is one of the most common practices used within the film industry to frustrate competition. See United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 658 (2d Cir. 1989).

Because block-booking involves a distributor compelling a theatre to accept movies that it does not want, actual coercion "is an indispensable element" of a block-booking violation. Unijax, Inc. v. Champion Int'l, Inc., 683 F.2d 678, 685 (2d Cir. 1982); accord American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 446 F.2d 1131, 1137 (2d Cir. 1971). The Supreme Court stated that

> the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that [*51] the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984); accord United States v. Loew's Inc., 371 U.S. 38, 45, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962)(quoting Northern Pac., 356 U.S. at 6)("The standard of illegality is that the seller must have 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . . .'").

Defendants correctly emphasize that because coercion is a critical element of a tying claim, a defendant must have sufficient economic power in the market for a product to be able to coerce buyers into purchasing the product. See Defendants' Mem. at 13. Only a film distributor, who possesses the copyright to a movie, has the ability to coerce an exhibitor to accept an unwanted film along with a desired one and, thereby, satisfy the coercion element of a tying agreement. Block-booking, therefore, is a wrong that distributors perpetrate upon exhibitors. Thus, Plaintiff's block-booking claim cannot [*52] stand against any of the exhibitor Defendants, which are not copyright holders and do

not possess the economic power over copyrighted motion pictures necessary to coerce a buyer to take undesired films.[31]

Still, although Plaintiff may not bring a block-booking claim against any of the exhibitor Defendants, Plaintiff has set forth sufficient allegations in the amended complaint alleging block-booking against Sony Pictures and the other Sony Corporate Entities to survive Defendants' Rule 12(b)(6) motion. Plaintiff specifically relies on letters it received from Defendant Reid, addressing Plaintiff's criticisms about Sony's booking practices at Plaintiff's theatres. See Amended Compl. at PP 79-80. Indeed, this Court finds that those letters present adequate facts indicating that the Sony Corporate Entities engaged in block-booking practices that adversely [*53] affected Plaintiff.

In a September 19, 1996 letter to Solow, Defendant Reid explained that distributors expect [32] to establish "long term relationships with . . . exhibitors who agree to participate in the liquidation of all their product, not just high profile films." Id. at P 81. Ostensibly, Reid's letter stated that if an exhibitor hopes to receive any suitable movies at all for a theatre, it is customary within the film industry for the exhibitor to agree to show all of a distributor's product, both the desired movies as well as the packaged ones. Defendant Reid's letter of January 16, 1996, responding to Solow's inquiry about possible exhibition of Sense and Sensibility at the Twin, confirmed that Sony Pictures adheres to the

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[31] The exhibitor Defendants include: Sony, Loews, TBA, Loews Fine Arts, James Loeks, Barrie Loeks, Travis Reid, Thomas Brueggemann, and Seymour H. Smith.

[32] James Bond: "Do you expect me to talk?"
Goldfinger: "No Mr. Bond, I expect you to die."
Goldfinger (GB United Artists 1961).

practice of expecting to liquidate its entire product with one exhibitor. See id. at P 80. In that letter, Reid stated that a change in Sony's East Side booking methods to play Sense and Sensibility at the Twin would have "obligated [Sony] to play a full portion of the Sony Pictures release schedule." Id. at P 80. This statement suggests that short of agreeing to exhibit all of Sony Pictures' [*54] films, Solow, or Sony as Solow's agent, could have done nothing to convince Sony Pictures to award the rights to show Sense and Sensibility to the Twin.

Distributors' expectations that an exhibitor will play a full schedule of their films and will comply with such a demand put a premium on the size of a theatre chain's circuit of theatres and eliminate the opportunity for a small, independent theatre owner, such as Plaintiff, to bid for films individually and obtain quality movies. See Paramount, 334 U.S. at 154. Plaintiff contends that, on the whole, it received only poorly performing movies and that it was unable to procure more desirable films because of the actions of Sony Pictures and the other Sony Corporate Entities.

Thus, this Court finds that the amended complaint includes adequate facts to support the allegation that the Sony Corporate [*55] Entities engaged in block-booking to the detriment of Plaintiff in violation of § 1. At this point in the litigation, the facts suggest that Plaintiff's difficulty in acquiring more profitable movies may be attributed to its unwillingness or its inability to accept all of Sony Pictures' films. Still, because block-booking is traditionally a claim that exhibitors bring against distributors, Plaintiff may assert such a claim only against the Sony Corporate Entities.

2. Illegal Relationship Licensing

While this Court finds that Plaintiff has included sufficient factual allegations in the amended complaint to support a block-booking claim against the Sony Corporate

Entities, such a claim cannot stand against any of the exhibitor Defendants because Plaintiff properly may assert a block-booking claim only against a distributor. Defendant Sony suggests that a block-booking claim likewise may not stand against them because "there is no claim that the [Sony] defendants were coerced into buying packages of films," and any relationships that they established with distributors were voluntary. In their submissions to this Court, Defendants confirmed that they "in fact desire the product that [*56] Plaintiff claims they are being forced to accept." Sacks Letter at 3; see also Defendants' Mem. at 15.

Indeed, some of Plaintiff's statements in the amended complaint identify Sony's booking arrangements as voluntary. According to the amended complaint:

> Sony has entered into agreements with certain motion picture distributors concerning the block-booking of motion pictures being distributed by those distributors.
>
> Pursuant to those block-booking arrangements, Sony agrees to "liquidate" or exhibit in its theatres all of the motion picture product of a distributor. In order to obtain high quality motion pictures, Sony agrees to also exhibit the lesser motion pictures.

Amended Compl. at PP 112-113 (emphasis added). These paragraphs do not assert that anyone coerced Defendant Sony to accept unwanted films, nor do they allege that Defendant Sony forced anyone to provide it with packages of films. Rather, these paragraphs indicate that Defendant Sony voluntarily engaged in relationships with distributors to exhibit all of a distributor's product and, thereby, guarantee a ready supply of films to play in their theatres.

These statements, therefore, are, surprisingly, [*57] somewhat contradictory to Plaintiff's block-booking claim. Nevertheless, ironically, despite the inconsistent allegations, Plaintiff unknowingly asserts an alternative theory of a § 1 violation against the exhibitor Defendants. Although Plaintiff's block-booking claim against the exhibitor Defendants must fail, Plaintiff has included sufficient facts in the amended complaint to sustain a § 1 illegal relationship licensing claim against all of the Sony Defendants. Thus, although Plaintiff has mislabeled its § 1 claim against Defendant Sony, this Court will analyze Plaintiff's allegations in light of the prevailing case law.

This Court recognizes the complexity of this issue and realizes that it must balance the interests of Defendants' autonomy in establishing their own booking relationships with the importance of having a fair and free economy and ensuring that those relationships do not violate the antitrust laws. To support their contention that distributors and exhibitors may have booking relationships with each other that do not violate the antitrust laws, Defendants cite the Supreme Court, which held that group-booking relationships that do not involve coercion can be legal. [*58] The Court stated:

> We do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film. All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted.

Paramount, 334 U.S. at 159. Moreover, Defendants also attempt to rely on a 1988 Department of Justice report ("Report") that thoroughly analyzed the history of the Paramount case and discussed various film-booking arrangements. See Defendants' Mem. at 15 n.6; Fleishman

Aff. at Ex. E. The Report identified relationship licensing as "a distributor's selection of a preferred exhibitor in whose theatre the distributor would like to play all or almost all of its pictures." Fleishman Aff. at Ex. E. at 39. The Report went on to explain that

> the distributor makes an initial on-the-merits selection of the exhibitor's theatre to play its films, and thereafter for an indeterminate period the distributor offers its films to the exhibitor and the exhibitor plays them. . . . In the Antitrust Division's view, the theatre-by-theatre injunction [that the Paramount case [*59] established] does not prohibit this type of relationship licensing.

Id. at Ex. E at 40. Moreover "so long as a competing exhibitor [is] not foreclosed from having his theatre considered on its merits for the licensing of one or more pictures in that group," the Report found that relationship licensing does not violate the antitrust laws. Id. at Ex E. at 42. In fact, the Report suggested that "relationship licensing may assure a small operator a ready supply of pictures to play." Id. at Ex. E. at 43. Thus, Defendants assert that because they voluntarily accepted any group-bookings that distributors offered to them, Plaintiff fails to include adequate allegations of the bedrock principle of a tying violation: coercion. See Defendants' Mem. at 15; Reply Mem. in Supp. of Defs.' Mot. to Dismiss the Am. Compl. ("Reply Mem.") at 2-3. Therefore, Defendants argue that this Court should dismiss Plaintiff's block-booking claim. See Defendants' Mem. at 15; Reply Mem. at 2-3.

Defendants' reliance on the Supreme Court decision and the Report, however, is misplaced and disingenuous because it ignores the underlying rationale driving the Supreme Court's decision in [*60] Paramount and its establishment of

the theatre-by-theatre injunction. The Court's primary consideration in the Paramount case was to prevent the stifling of competition by ensuring that all exhibitors have fair access to motion pictures. When discussing certain kinds[33] of licensing relationships, the Court recognized that some licensing arrangements are unlawful restraints of trade because they

> eliminate the possibility of bidding for films theatre by theatre. In that way they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit [of theatres]. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators.

Paramount, 334 U.S. at 154; see Loew's, 705 F. Supp. at 880 (citing this explanation as the crux of the rationale in Paramount).

[*61]

Thus, if distributors and exhibitors engaged in relationship licensing in such a manner as to hinder other exhibitors' ability to acquire quality movies, then such relationship licensing would violate § 1. Moreover, the Report actually propounds such a position on relationship licensing. Defendants were selective in their citation of the Report. While the Report indicated that relationship licensing may be legal under the antitrust laws, it also stated:

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[33] "You see in this world there's two kinds of people my friend--those with loaded guns and those who dig. You dig!" The Good, the Bad, and the Ugly (United Artists 1966).

> The foregoing discussion should not be read to suggest, however, that in all cases relationship licensing is lawful. Where, for example, such licensing involves circuit dealing, favoritism toward affiliates, preferential contract terms, or rejection out-of-hand of competing exhibitors' offers without any "on-the-merits" determination, the mere fact that relationship licensing is also involved will not immunize that conduct. Thus, we will review on its merits each complaint that the theatre-by-theatre injunction has been violated to determine whether in a relationship licensing situation any of the prohibited conduct discussed above is present.

Fleishman Aff. at Ex. E. at 50-51. [34] Accordingly, in considering Plaintiff's [*62] allegations against Defendants, this Court must be mindful of the Supreme Court's concern that some booking relationships may have the effect of excluding exhibitors, especially small, independent exhibitors, from fair access to films.

Here, the amended complaint recites sufficient allegations suggesting that Defendants have engaged in illegal relationship licensing, "elevating [their] own interests over those [*63] of the plaintiff's theatres, in using plaintiff's

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[34] Both the Supreme Court decision and the Report suggest that any illegality in relationship licenses would generally be caused by a distributor at the expense of exhibitors, particularly small, independent exhibitors. The Supreme Court, however, also noted that "acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one." Paramount, 334 U.S. at 161. Thus, because relationship licensing is consensual between the participating distributors and exhibitors, it follows that a court may also hold exhibitors liable for any illegality.

theatres to curry favor with movie distributors purely for Sony's own advantage and to benefit Sony's own theatre operations." Amended Compl. at P 50. First, Defendant Sony effectively guaranteed distributors a venue for their films despite any declining box-office receipts, by either exhibiting movies at Plaintiff's theatres for extended runs, or moving films to Plaintiff's theatres from Sony's theatres once those movies became less profitable. See id. at PP 51, 58, 61-62, 65, 72. For instance, regardless of sharply decreasing profitability, in 1996, Sony showed Hamlet at the Paris for an allegedly unreasonably long run, and in 1997, Sony booked Face Off at the Twin for a three-month period. See id. at 65, 72.

Second, Defendant Sony arranged for the premieres of several films at the Paris, affording distributors the benefit of the Paris's special reputation as an elite premiere venue, but thereafter exhibited those films at its own theatres, where it received 100 percent of the profits. See id. at PP 51-53. For example, after helping Miramax plan the premiere of Emma at the Paris in April 1996, Sony transferred [*64] Emma to its Lincoln Square theatre and to a Cineplex theatre. See id. at P 52.

Third, purportedly in an effort to foster its own relationships with distributors by offering them more than one venue to exhibit their films, Sony executives allegedly attempted to harass Plaintiff into deviating from its long-time exclusive booking practice at the Paris. Plaintiff recounts that in June 1996, Defendant Brueggemann notified Solow that Sony was discussing with distributors the exhibition of films at the Paris on a non-exclusive basis. See id. at P 60. Plaintiff also cites an August 15, 1996 letter from Defendant Reid, warning that unless Plaintiff agreed to abandon its exclusive booking policy, Sony would refuse to book certain films at the Paris. See id. at P 66.

Fourth, Plaintiff includes allegations in the amended complaint that Sony elevated its own business interests over Plaintiff's. In 1995, Solow asked Defendant Brueggemann to inquire about the possibility of leasing and exhibiting Belle at the Paris. See id. at P 55. Plaintiff asserts that, with the intent of strengthening Sony's ties to Miramax, Brueggemann instead proposed the idea to Miramax, which thereafter [*65] bought and exhibited Belle at the Paris, thereby favoring Miramax and depriving Plaintiff of a lucrative business opportunity. See id. at P 57.

Fifth, the amended complaint demonstrates that Sony is in a propitious position to accept all of a distributor's product, because, as manager of Plaintiff's theatres, Sony is able to keep all the heralded films for its own theatres, where it receives all the profits, while "dumping the refuse of its . . . deals" in Plaintiff's theatres, id. at P 117, where it may keep only forty percent of net income after expenses. See id. at P 40. Plaintiff enumerates a long list of underperforming films that Sony booked at the Twin while Sony played more popular and productive pictures at its own theatres. See id. at PP 68-71; see also id. at PP 58, 77 (alleging that Sony "failed to book appropriate films at the Paris" and "used [the Festival] as a 'dumping ground'"). Plaintiff also points to a statement from Defendant Reid, acknowledging the acceptance of sub-standard pictures as a method of "forming relationships [with distributors] in order to be booked properly on a long term basis." Id. at P 79.

Finally, considering [*66] these allegations, this Court is concerned that Defendants will use the benefits of their merger, which brought together top distributors and exhibitors, see infra part V.B., to secure a competitive dominance within the film industry, by favoring affiliates and freezing out small exhibitors from access to movies. This Court's wariness is heightened by such evidence as Defendant Reid's June 1996 threat that Defendants "would

make every effort to influence distributors not to deliver quality films to plaintiff's theatres," if Plaintiff terminated Sony as manager of Plaintiff's theatres. Id. at P 84.

Plaintiff states that "as a result of the foregoing agreements in restraint of trade, plaintiff is damaged because its ability to compete as an independent theatre owner is effectively undermined." Id. at P 117. All of the actions that Plaintiff cites in support of its claim promote relations between Defendants and other distributors and help ensure that Defendants will have a supply of quality films from which to choose and a competitive advantage over other exhibitors. Plaintiff asserts that it "did not benefit from Defendants' anti-competitive arrangements and was repeatedly [*67] damaged by those arrangements." Id. Accordingly, Plaintiff sets forth enough facts to uphold a claim for illegal relationship licensing against Defendants.

At this stage, Plaintiff must now proceed in a more astute manner, delineating more cogently the exact nature of its § 1 claims against the proper Sony Defendants and their underlying bases. The lack of precision in Plaintiff's amended complaint was disconcerting to this Court. It was unclear whether Plaintiff's § 1 claim alleged block-booking, illegal relationship licensing, or both. See Rule 8(e)(2)("A party may set forth two or more statements of a claim . . . alternately or hypothetically, either in one count . . . or in separate counts . . . . A party may also state as many separate claims . . . as the party has regardless of consistency . . . ."). Plaintiff conflates a block-booking claim against Defendants, which requires an element of coercion, with allegations that Sony agreed to engage in the block-booking relationships. Emphasizing that their booking relationships with distributors were voluntary, Defendants correctly point out that a block-booking claim against them cannot stand because Plaintiff fails to [*68] demonstrate coercion. Still, Defendants arguments do not exonerate them from any

antitrust violations. Defendants cannot have it both ways because even voluntary relationships may violate § 1.

Defendants' motion to dismiss Plaintiff's § 1 claim is, therefore, denied. Defendants had the burden of demonstrating to this Court that Plaintiff's amended complaint presented no interpretation of facts that could support a § 1 claim. Defendants have failed to sustain their burden. Defendant Reid's January 16, 1996 letter suggests that Sony felt forced "to play a full portion of Sony Pictures release schedule." Amended Compl. at P 80. If, as this letter appears to indicate, Sony Pictures did employ coercion against Sony, Plaintiff's managing agent, then Plaintiff may proceed with a block-booking claim, a per se violation of § 1, solely against the Sony Corporate Entities. If, however, as Defendants argue, Reid's letter is merely an overstatement and Defendants' booking relationships are completely voluntary, then the block-booking claim must fail and there is no per se violation of § 1. Instead, Plaintiff should move forward on an illegal relationship licensing claim against Defendants. [*69] At that point, this Court will be in a position to review the individual merits of this case to determine whether Plaintiff asserts a satisfactory illegal relationship licensing violation.

Either way, the amended complaint contains enough facts to support a § 1 claim against Defendants. Further discovery may enlighten both the parties and this Court as to which construction of a § 1 claim is more feasible. Accordingly, despite the imprecise and ambiguous nature of the amended complaint, Plaintiff presents an actionable § 1 claim either as a block-booking claim against the Sony Corporate Entities or as an illegal relationship licensing claim against all of the Sony Defendants.

B. Clayton Act § 7 Claims: Merger

Plaintiff claims that the merger that Defendants entered into with Cineplex to form LCE violates § 7. See Amended Compl. at PP 127-131. Plaintiff contends that it will be unable to compete as an independent theatre operator because "the merger will dramatically enhance Sony's market power in relevant markets." [35] Id. at P 129. Specifically, Plaintiff argues that the merger effectuates intimate affiliations between exhibitors, Sony and Cineplex, and distributors, [*70] Sony Pictures and Universal Pictures, which, in turn, "will impede plaintiff's ability to obtain quality motion pictures." Id. at P 130.

Section 7 prohibits mergers whose effect "may be substantially [*71] to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. The Supreme Court remarked that § 7 creates a "relatively expansive definition of antitrust liability." California v. American Stores Co., 495 U.S. 271, 284, 109 L. Ed. 2d 240, 110 S. Ct. 1853 (1990). Additionally, as § 7 aims to catch a threat to competition in its incipiency, the Supreme Court held that § 7 is concerned with probabilities, not certainties, and, therefore, "mergers with a probable anticompetitive effect [are] . . . proscribed by [§ 7]." Brown Shoe, 370 U.S. at 323 (emphasis added); accord Fruehauf Corp. v. Federal Trade Commission, 603

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[35] Identifying the appropriate market--product and geographic--is a "necessary predicate" to an analysis of the probable effects that a merger will have on competition. Brown Shoe v. United States, 370 U.S. 294, 324, 335, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962). Here, this Court finds that the product market is the film exhibition market, and the relevant geographic market is Manhattan. See id. at 336 ("Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one."). In addition, it should be noted that the Upper East Side of Manhattan is "the most important market because of the concentration of nationally influential film critics and news media." Loew's, 705 F. Supp. at 887-88 (citation omitted).

F.2d 345, 351 (2d Cir. 1979). Nevertheless, the Second Circuit emphasized that "'mere possibility' will not suffice," and, rather, a reasonable probability of substantial impairment of competition must exist. Fruehauf, 603 F.2d at 351.

Accordingly, to have standing, under § 7, to challenge the LCE merger, Plaintiff must offer a sufficient factual basis demonstrating that the merger threatens Plaintiff with probable antitrust injury. See American Stores, 495 U.S. at 281-82; [*72] Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 105, 122, 93 L. Ed. 2d 427, 107 S. Ct. 484; Consolidated Gold Fields PLC v. Minorco, S.A. 871 F.2d 252, 254 (2d Cir. 1989); R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102, 103 (2d Cir. 1989); see also Remington Prods., Inc. v. North Am. Philips, Corp., 755 F. Supp. 52, 55 (D. Conn. 1991)("One seeking equitable relief [to demonstrate a violation of § 7] need only show 'threatened' loss or damage.").

Moreover, the Supreme Court has held that a

> plaintiff[] must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes [a] defendant's acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)(quoting Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)). [*73] The Supreme Court explained that

> injury, although casually related to an antitrust violation, nevertheless will not qualify as "antitrust injury" unless it is attributable to an anti-competitive aspect of the practice under scrutiny, "since '[it] is inimical to [the antitrust] laws to award damages' for losses stemming from continued competition."

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)(quoting Cargill, 479 U.S. at 109-10 (quoting Brunswick, 429 U.S. at 488))(alterations in original).

The issue before this Court, therefore, is whether the amended complaint has alleged adequate facts to show that the LCE merger threatens Plaintiff with the kind of injury Congress targeted in enacting the antitrust laws. This Court finds that the amended complaint has sustained this burden. Here, Plaintiff alleges that the merger causes antitrust injury by restraining Plaintiff's access to quality motion pictures and, effectively, depriving Plaintiff of its ability to compete for first-run films. [36] See Amended Compl. at P 130. The amended complaint presents facts [*74] demonstrating Defendants' anti-competitive actions designed to limit Plaintiff's ability to obtain select movies. See id. at PP 51-53, 58, 68-71, 77; see supra part V.A.2. Plaintiff maintains that the merger will enhance Defendants' ability to divert more profitable films away from Plaintiff's theatres. See Amended Compl. at PP 129-30. The Second Circuit has found the claim that a merger prevents a plaintiff from competing in the relevant market sufficient under § 7. See Bigelow, 867 F.2d at 108, 111.

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[36] "See you don't understand. I could have had class. I coulda been a contender." On the Waterfront (Columbia 1954).

This Court must, therefore, determine if the merger affords LCE the power to limit its competitors' ability to compete. When a court evaluates the effects of a merger, "the starting point is [the merged entity's] post-acquisition market share." Id. at 107 (citing Brown Shoe, 370 U.S. at 343). The Supreme Court stated that "market share [*75] . . . is one of the most important factors to be considered when determining the probable effects of the combination on . . . competition in the relevant market." Brown Shoe, 370 U.S. at 343.

Thus, the size of the merged company in relation to the size of its competitors is a primary consideration. See United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)(noting that the size of a merger can make the merger "inherently suspect in light of Congress' design in § 7 to prevent undue concentration"); see also Brunswick, 429 U.S. at 487 ("If the acquisition here were unlawful, it is because they brought a 'deep pocket' parent into a market of 'pygmies.'"). Indeed, the legislative history of the 1950 amendments to § 7 indicates that a merger may be perceived as substantially lessening competition or tending to create a monopoly if, inter alia, "the relative size of the acquiring corporation has increased to such a point that its advantage over competitors threaten[s] to be 'decisive'." H.R. Rep. No. 1191, 81st Cong., 1st Sess., ("H.R. 1191") at 8 (1949), quoted in Brown Shoe, 370 U.S. at 321 n.36; [*76] see Brown Shoe 370 U.S. at 315 ("The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy."). The Supreme Court understood this rationale for the amendments as an "intense congressional concern with [market] concentration [that in certain cases] warrants dispensing . . . with elaborate proof of market structure, market behavior, or probable

anticompetitive effects." Philadelphia Nat'l Bank, 374 U.S. at 363.

Moreover, the Court emphatically agreed with Congress's concern, stating:

> We think that a merger that produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

Id. (citing United States v. Koppers Co., 202 F. Supp. 437 (W.D. Pa. 1962)). Here, this Court is presented with both a horizontal merger [37] [*77] and, more significantly, a vertical merger. [38] See H.R. 1191 at 11; Brown Shoe, 370 U.S. at 317 (noting that § 7 applies to both horizontal and vertical mergers).

Defendants observe that this Court must consider the size of Defendants' post-merger market share when weighing the

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[37] "An economic arrangement between companies performing similar functions in the production or sale of comparable goods or services is characterized as 'horizontal.'" Brown Shoe, 370 U.S. at 334. The LCE merger horizontally consolidated the distributor Sony Pictures with the distributor Universal Pictures and the exhibitor Sony with the exhibitor Cineplex.

[38] "Economic arrangements between companies standing in a supplier-customer relationship are characterized as 'vertical'" Brown Shoe, 370 U.S. at 323. The LCE merger vertically consolidated the distributors Sony Pictures and Universal Pictures with the exhibitors Sony and Cineplex.

probable effects on competition. Therefore, [*78] in view of the Stipulation and Order that required Sony and Cineplex to divest themselves of a total of fourteen theatres before merging, Defendants urge this Court to dismiss Plaintiff's § 7 claim. See Defendants' Judicial Notice Mem. at 1-2; see also Sacks Letter at 3 ("Plaintiff's merger claim is moot because DOJ has already cleared the merger between LTM Holdings, Inc. and Cineplex and in so doing, DOJ required them to divest certain theatre assets in both Manhattan and Chicago."). This Court recognizes that as a result of the divestiture, the merged entity LCE operates the same number of New York theatres that Sony managed prior to the merger. See supra part IV. Nevertheless, this Court finds this fact alone insufficient to support the motion to dismiss.

First, [39] it must be noted that "the Department of Justice at times countenances a higher level of anti-competitive behavior than do the courts," and, therefore, it is the responsibility of this Court to undertake its own evaluation of the merger in light of the allegations in the amended complaint. Loew's, 705 F. Supp. at 891; see also id. at 879 ("The Attorney General's concessions [*79] to the court regarding what might be widespread anti-competitive behavior in this industry left open a number of crucial questions that the court felt needed to be answered . . . ."); John M. Garon, Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas, 17 Cardozo Arts & Ent. L.J. 491, 621 n.563 (1999)("Despite regular review by the Department of Justice . . . illegal trade practice [within the film industry] continue[s] to occur.")" Second, the Stipulation and Order itself states:

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[39] "Who's on first, What's on Second, I Don't Know is on third . . . ." The Naughty Nineties (Universal 1945).

> Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against defendants.

Stipulation and Order at 20. Accordingly, the settlement that Sony, Cineplex, the Government, and the States of New York and Illinois entered to complete the merger does not govern Plaintiffs § 7 claim.

[*80]

Additionally, at this point, the parties have not presented this Court an adequate factual foundation upon which to evaluate the actual effects of the horizontal merger. For example, while this Court notices that LCE possesses the same number of theatres in Manhattan that Sony ran prior to the merger, this fact does not necessarily diminish Defendants' market share in Manhattan. This Court has no information regarding the nature of the divested theatres, i.e., their age, their condition, or whether they are single or multi-screen theatres. Perhaps, while controlling the same number of theatres in Manhattan, LCE now has twice as many screens; perhaps the divestiture merely has delayed LCE's dominance over the competition. This Court is also interested in the effect the merger has had on exhibition prices. [40] Therefore, further discovery is necessary to address this Court's concerns.

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[40] This Court is wary that the merger may facilitate escalating and prohibitively expensive ticket-prices. On February 28, 1999, the New York Times reported the recent increase of LCE ticket prices to $ 9.50, the highest in the nation. See Robert D. McFadden, Appearing Finally in Theaters: The $ 9.50 Movie, N.Y. Times, February 28, 1999. Granted,

(continued...)

[*81]

More alarming to this Court, though, is the vertical unification that the LCE merger caused between powerful distributors and exhibitors. The Supreme Court warned that an important factor for a court to consider when assaying the legality of a merger is "the trend toward concentration in the industry." Brown Shoe, 370 U.S. at 332. Indeed, one court has noted that the film industry "is a concentrated industry in which there has been a recent trend toward vertical integration which appears significant." Loew's, 705 F. Supp. at 885.

Accordingly, this Court must be vigilant in assessing the effects of the prominent vertical integration in this case, as Defendants are both exhibitors and distributors and the merger places them within the same company. Defendants represent a unique entity. To understand the precise structure of this entity, this Court must consider Defendants in their entirety. To do otherwise would be shortsighted. Defendants are indeed the sum of all their parts, and they cannot evade

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(...continued)
the increase may have had no connection at all to the merger, as in recent years, increases in ticket prices have been a regular occurrence in Manhattan. A March 19, 1999 New York Times article reported that "in the last five years, movie ticket prices in the city have gone up by 27 percent, more than twice as fast as the cost of living." Clyde Haberman, Moviegoers Vs. Theaters: Food Fight!, N.Y. Times, March 19, 1999, at B1.

The present jump to $ 9.50, however, occurred despite assurances from a Cineplex executive, at the time of the merger, guaranteeing that the merger would not cause an increase in ticket prices. See id. ("I can guarantee you that ticket prices will not increase as a result of this merger."). This Court also notes that Manhattan, in addition to having the dubious distinction of charging the most expensive movie-ticket prices, offers a paucity of matinee theatre prices at its movie theatres.

scrutiny by partitioning themselves. Pieces of a puzzle viewed separately form unintelligible, irregular shapes, but considered together reveal a discernible [*82] image. [41] Thus, to allow fragmentation to provide an escape from responsibility would be to deal in illusion. This Court sees right through the cellophane fence that Defendants attempt to hide behind.

In this case, the LCE merger vertically integrated elite exhibitors and distributors, concentrating those entities together to create a film industry powerhouse. [42] Prior to the merger between Sony and Cineplex, Sony was the largest motion picture exhibitor in Manhattan and one of the largest in the United States; Sony Pictures was the largest film distributor in the world and was also closely affiliated with Columbia Pictures; Cineplex was the second largest movie exhibitor in Manhattan and the fourth largest exhibitor in the United States; and Universal Studios, the distributor with a controlling interest in Cineplex, was also one of the six largest national film distributors. See Amended Compl. at PP 1, 3; Plaintiff's Mem. [*83] in Opp'n to Defs.' Mot. to Dismiss ("Plaintiff's Mem.") at 1-2. Thus, regardless of the divestiture of theatres resulting in LCE's possession of the same total number of theatres within Manhattan that Sony had before consummating the merger, the merger still combined two dominant Manhattan movie exhibitors with extensive connections to powerful film distributors. See H.R. 1191 at 8 (suggesting that § 7 can be violated if "buyers and sellers in the relevant market had established relationships

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[41] "I guess Rosebud is just a piece in a jigsaw puzzle." Citizen Kane (RKO 1941).

[42] "Ladies and gentlemen, look at Kong, the eighth wonder of the world." King Kong (RKO 1933).

depriving their rivals of a fair opportunity to compete"), quoted in Brown Shoe, 370 U.S. at 321 n.36.

A vertical merger, however, does not automatically have an anti-competitive effect. See Fruehauf, 603 F.2d at 351.

> As the Supreme Court recognized in Brown Shoe . . . the fountainhead of § 7 analysis of vertical mergers, the competitive significance of a vertical merger results [*84] primarily from the degree, if any, to which it may increase barriers to entry into the market or reduce competition by (1) foreclosing competitors of the purchasing firm in the merger from access to a potential source of supply, or from access on competitive terms, (2) by foreclosing competitors of the selling firm . . . from access to the market or a substantial portion of it, or (3) by forcing actual or potential competitors to enter or continue in the market only on a vertically integrated basis because of advantages unrelated to economies attributable solely to integration. . . . The ultimate objective, however, is to determine whether and how the particular merger in issue may lessen competition, i.e., what its anticompetitive effect on the market, if any, is likely to be.

Id. at 352 (citing Brown Shoe, 370 U.S. at 328). Thus, in assessing the competitive results of the vertical merger that exists in this case, this Court must primarily concern itself with the possibility of market foreclosure, the exact antitrust injury that Plaintiff alleges.

In view of this high standard, this Court is amazed at Defendants' flat and unsupported denial [*85] of Plaintiff's allegation that the merger will permit LCE to obtain more quality films than Sony and Cineplex were able to acquire

separately. See Defendants' Mem. at 20-21. Defendants adamantly assert that "the notion is illogical," insisting that distributors, who have the market power to offer films, decide where to place their films and what exhibitor bids to accept. Id. In so claiming, Defendants seek to circumvent the instruction of the district court in Paramount that "defendants must be viewed collectively rather than independently as to the power which they exercise[] over the market by their theatre holdings." United States v. Paramount Pictures, Inc., 85 F. Supp. 881, 894 (1949) (citing American Tobacco Co. v. United States, 328 U.S. 781, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)).

Analyzing the vertical merger, particularly in the context of the motion picture industry, see Brown Shoe, 370 U.S. at 321-22, this Court notes that in Loew's, where a producer/distributor requested that the court consider modifying the antitrust consent judgment, the court warned of the danger that when distributors and exhibitors merge, the merged entities may predominantly [*86] or exclusively deal only with one another. 705 F. Supp. at 886. The Court in Loew's recognized the real potential for foreclosure of access to theatre space for competing distributors and of access to film product for competing exhibitors that may result if the vertically integrated company attempts to keep everything "in house." [43] See id. at 887, 888.

Here, Plaintiff alleges that LCE will exploit its new commanding position in the film industry and the relevant market to acquire advantageous booking relationships that will stifle competition from independent exhibitors such as

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[43] "There's no place like home!" The Wizard of Oz (Metro-Goldwyn-Mayer 1939). "E.T. phone home." E.T. the Extra-Terrestrial (Universal 1982).

Plaintiff. This Court looks askance at the booking relationships that the merger facilitates because of "the likelihood that foreclosure of access to film product or exhibition space might be caused by the . . . acquisition." Loew's, 705 F. Supp. at 885. [*87] Plaintiff alleges that prior to the merger, Defendants already engaged in activity that frustrated Plaintiff's ability to obtain films for exhibition. See Amended Compl. at PP 51-53, 58, 68-71, 77; see supra part V.A.2. The merger presents Defendants with an opportunity and an avenue through which they can further thwart Plaintiff's and other exhibitors' access to movies. A decision by LCE's distributors and exhibitors to restrict availability to their films and to their theatre space could potentially harm competition. This Court is, therefore, worried that "the market presence of the new vertically integrated company [may be] great enough that the potential anti-competitive effects become a significant concern." Loew's, 705 F. Supp. at 886 (citing Brown Shoe, 370 U.S. at 328-29).

Thus, both parties now have the opportunity to present further facts supporting their positions, thereby enabling this Court to make a determination about the effects of the LCE merger on competition on a more fully developed record. First, this Court is aware that "while market share data alone does not create an irrebutable presumption of illegality, such a [*88] presumption can be overcome only by evidence that the market share data gives an 'inaccurate account of the acquisition's probable effects on competition.'" Bigelow, 867 F.2d at 108 (quoting United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 120, 45 L. Ed. 2d 41, 95 S. Ct. 2099 (1975)(internal citations omitted). Discovery will offer Defendants a chance to present evidence to this Court refuting this presumption.

Second, a more detailed record is indispensable to a court assessing the legality of a merger. In Brown Shoe, the Supreme Court stated that examining "the very nature and

purpose of a [merger]" is an extremely important factor in assessing its legality. Brown Shoe, 370 U.S. at 329. Discovery on the § 7 claim will afford Defendants an opportunity to present evidence that the merger was motivated by a legitimate business purpose. See, e.g., Loew's, 705 F. Supp. at 884-85 (discussing several legitimate business purposes that motivated a producer/distributor to acquire a movie exhibition company). Additionally, in Cargill, the Supreme Court referred to evidence that the plaintiff presented [*89] at trial to help define the threatened loss, 479 U.S. at 114, and in Bigelow the Second Circuit suggested that a full trial on the merits may be necessary to appropriately assess market share data, market foreclosure, and the decrease of competition. 867 F.2d at 111. This Court, likewise, awaits more detailed submissions from both parties before making determinations about potential foreclosure.

Based on the alleged facts available to this Court at this time, however, there is certainly an adequate basis to recognize a reasonable probability that the LCE merger will lessen competition. Plaintiff "is entitled to the benefit of all reasonable inferences that follow from the alleged deliberate acquisition by merger of substantial monopoly power in the [Manhattan movie market] and to a presumption that . . . [LCE will] be likely to eliminate competition in that market by, inter alia, reducing [Plaintiff's] access to [quality films]," a sufficient antitrust injury. Bigelow, 867 F.2d at 111.

One court in this Circuit has stated that the film industry "has shown a proclivity for anti-competitive behavior when given the opportunity" [*90] and noted "evidence of a climate of non-compliance with this court's consent judgments." Loew's, 705 F. Supp. at 885. Considering Plaintiff's allegations, which this court must accept as true, that Defendants have attempted to achieve a competitive advantage over Plaintiff and other exhibitors and that

Defendants have already successfully effected the closure of the Festival permanently and the Paris temporarily, see Amended Compl. at P 121, this Court cannot, at this time, assume that Defendants, in their new position as part of LCE, will be on their best behavior. Accordingly, this Court will not dismiss Plaintiff's § 7 claim.

C. Sherman Act § 2 Claims: Attempted Monopolization

Plaintiff asserts that Defendants' conduct constitutes an attempted monopolization in violation of § 2. See id. at PP 119-126. Plaintiff maintains that Defendants have manifested an intent to monopolize the motion picture exhibition market in Manhattan and have "engaged in predatory conduct, including threats of a concerted refusal to deal and actual diversion of motion picture product," all aimed at effectuating their plan to eliminate competition from other exhibitors such as [*91] Plaintiff. Id. at P 121. Allegedly, Defendants' actions have already been successful, "forcing the temporary closure of the Paris Theatre, dramatically damaging business at the New York Twin, and precipitating the economic decision to close the Festival Theatre." Id. In addition, Plaintiff claims that the merger creates too high of a concentration of exhibition theatres and corporate affiliations with distributors, affording Defendants "the power [to] effectively deprive independent theatre owners such as plaintiff of quality motion pictures, as well as to raise prices to consumers virtually at will." Id. at P 126.

Section 2 makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States." 15

U.S.C. § 2. [44] To establish a claim for attempted monopolization, a plaintiff must prove "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993). [*92] The amended complaint sets forth an adequate claim against Defendants for attempted monopolization.

Plaintiff has supplied this Court with ample allegations of Defendants' anti-competitive acts. See supra parts V.A., V.B. In view of the litany of alleged anti-competitive acts that Plaintiff included in the amended complaint, Defendants' argument that Plaintiff "has not alleged any predatory conduct by the defendants" confounds this Court. Defendants' Mem. at 21. The amended complaint contains an extensive depiction of actions through which Defendants purportedly attempted to divert profitable movies away from Plaintiff's theatres and to diminish competition. See Amended Compl. at PP 51-85. Plaintiff maintains that Defendants' conduct successfully prevents it from having access to quality films and from effectively competing within the Manhattan exhibition market.

This Court also finds [*93] ample evidence demonstrating Defendants' specific intent for attempted monopolization. First, the Second Circuit has held that a court may infer specific intent from a defendant's conduct. See Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 101 (2d Cir. 1998)(citing Northeastern Tel. Co. v. American Tel. Co., 651 F.2d 76, 85 (2d Cir. 1981)); Volvo

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[44] "Greed, for the lack of a better word, is good. Greed is right. Greed works." Wall Street (20th Century Fox 1987).

N. Am. Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 74 (2d Cir. 1988). Considering the laundry list of anti-competitive acts that Plaintiff asserts in its amended complaint, this Court finds it more than likely that Defendants possessed specific intent to destroy competition. Second, the Second Circuit stated that defendants' intent "can be derived from their words." Tops Markets, 142 F.3d at 101. Here, Plaintiff alleges that Defendant Reid, a Sony official, "adopted a peremptory, adversarial and threatening tone in communicating with plaintiff." Amended Compl. at P 83. Specifically, Plaintiff complains that Defendant Reid "threatened that he and the other defendants would make every effort to influence distributors not to deliver quality films [*94] to plaintiff's theatres." Id. at P 84. This Court, therefore, accepts as sufficient Plaintiff's allegations that Defendants intended to monopolize the Manhattan market, as evidenced by the words of one of their own officials.

Defendants, however, argue that Defendant Reid's threat of encouraging diversion of product away from Plaintiff was in response to Plaintiff's intimation that it might terminate Sony as manager of Plaintiff's theatres, an act that never [45] occurred. See Defendants' Mem. at 22. Citing case law from the Eighth and Ninth Circuits, Defendants contend that "allegations . . . of conditional 'threats' (with an unfulfilled condition) fail to sufficiently allege that defendants engaged in predatory or anticompetitive conduct." Id. (citing Conoco Inc. v. Inman Oil Co., 774 F.2d 895, 905 (8th Cir. 1985); Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 19 (9th Cir. 1971)). Defendants' argument is both tenuous and erroneous.

[*95]

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[45] "Call your mother and tell her you will never be a lawyer." The Paper Chase (20th Century Fox 1973).

First, based on the other allegations in the amended complaint, it appears to this Court that Defendants may have not only engaged in threats but actually followed through with the predatory actions of which Reid threatened. This Court also finds it just as reasonable to speculate that Defendant Reid's threat was motivated by Defendants' own realization that without Plaintiff's theatres, Defendants would be without an outlet to dump the sub-standard films that they received from distributors. Thus, a fair reading of Reid's threat can be understood to indicate that, regardless of whether Plaintiff ultimately fired Sony as manager of its theatres, Defendants were interested in reducing competition from Plaintiff.

Second, in support of their proposition that words are not enough to demonstrate specific intent, Defendants cite to other Circuits, ignoring the view of this Circuit in Tops Market. 142 F.3d at 101. Not only are the opinions of other Circuits not binding upon this Court, but they certainly must be rejected when the law of this Circuit expresses a contrary view. See Newsweek, Inc. v. United States Postal Serv., 663 F.2d 1186, 1196 (2d Cir. 1981) [*96] ("At the outset, it is well settled that the decisions of one Circuit Court of Appeals are not binding upon another Circuit."); Christ the King Regional High Sch. v. Culvert, 644 F. Supp. 1490, 1496 (S.D.N.Y. 1986), aff'd, 815 F.2d 219 (2d Cir. 1987)(emphasizing that contrary views or criticisms from other Circuits do not authorize a district court to reject the opinion of the Second Circuit). Defendants do not even attempt to distinguish the facts of our case from those in the Second Circuit's decision.

Third, even under the rationales of the Eighth and Ninth Circuits, Defendants' contention fails. Both the Eight and Ninth Circuit's opinions hold that a court must reject the implication of specific intent from statements only when corroborating evidence of anti-competitive conduct does not

exist. See Conoco, 774 F.2d at 905 (stating that "isolated statements by a single . . . official . . . are insufficient to prove . . . intent to monopolize in the absence of corroborating conduct"); Dahl, 448 F.2d at 19 (finding that "a manifestation of intent . . in the absence of evidence of unfair, anti-competitive or predatory [*97] conduct, is not enough to establish a violation of § 2"). In this case, this Court finds ample corroborating allegations to help substantiate Defendant Reid's threats.

Finally, Plaintiffs allege sufficient facts to establish the real probability that Defendants possess the requisite power to achieve monopolization. "In order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market." Spectrum Sports, 506 U.S. at 456; accord AD/SAT v. Associated Press, 181 F.3d 216, 1999 WL 415326, at *8 (2d Cir. 1999)(stating that for an attempted monopolization claim, defendant's market share is the principal sign of a dangerous probability of success); Tops Markets, 142 F.3d at 100 ("Critical to deciding the dangerous probability prong of plaintiff's attempted monopolization claim is defendant's economic power in the relevant market."). This Court has already examined, at length, Plaintiff's allegations regarding Defendants' market presence and has determined that there are enough facts [*98] upon which to posit that the LCE merger enables Defendants to destroy competition. See supra part V.B.

Sony Pictures, as a distributor, is now intimately connected with two major movie chains to license the rights of its films, while Sony, as exhibitors, has established concrete relationships with top film distributors from whom they can obtain a ready supply of movies to exhibit. The awesome vertical integration that the merger created affords Defendants extensive power within the film industry to gain

a major competitive advantage over rival distributors and exhibitors. Such market power, coupled with Defendants' alleged exclusionary conduct and intent to control the market, leads this Court to the conclusion that a dangerous probability of achieving monopolization also exists. See Paramount, 334 U.S. at 174 (stating that "a vertically integrated enterprise . . . will constitute monopoly which, though unexercised, violates the Sherman Act provided a power to exclude competition is coupled with a purpose or intent to do so."); Volvo, 857 F.2d at 74 (holding that when a court is faced with "both exclusionary conduct and the existence of monopoly [*99] power . . . a dangerous probability of success, may be inferred."). Accordingly, this Court finds that the amended complaint satisfactorily alleges that, by their words and actions, Defendants have demonstrated a specific intent to create a monopoly with a dangerous probability of success.

VI. State Claims

Having found that Plaintiff has set forth sufficient factual allegations in the amended complaint to support its federal law claims against Defendants, for purposes of judicial economy, convenience, and fairness, this Court chooses to exercise supplemental jurisdiction over Plaintiff's state claims. See City of Chicago v. International College of Surgeons, 522 U.S. 156, 173, 139 L. Ed. 2d 525, 118 S. Ct. 523 (1997)(citing Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 98 L. Ed. 2d 720, 108 S. Ct. 614 (1988)).

A. Tortious Interference with Prospective Business Relations [46]

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[46] This tort has also been referred to as interference with economic advantage, prospective advantage, business relations, or pre-contractual relations. See Martin Ice Cream, Co. v. Chipwich, Inc., 554 F. Supp. 933, 945 (S.D.N.Y. 1983).

[*100]

Plaintiff alleges that Defendant unlawfully interfered with Plaintiff's prospective contractual relationships. See Amended Compl. at PP 101-104. Specifically, Plaintiff argues that

> defendants' actions in inducing film distributors not to provide quality films to plaintiff and in preventing plaintiff from pursuing the substantial business opportunity associated with plaintiff's concept of acquiring the rights to and reissuing the film Belle de Jour . . . have interfered with and continue[] to interfere with plaintiff's prospective business relations in the field of motion picture exhibition.

Id. at PP 102-03. To sustain its claim for tortious interference with prospective economic advantage, Plaintiff must satisfy an extremely high pleading standard. Plaintiff's allegations must include elements "more demanding than those for interference with [the] performance of an existing contract." Fine v. Doernberg & Co., Inc., 203 A.D.2d 419, 610 N.Y.S.2d 566, 567 (App. Div. 2d Dep't 1994)(citation omitted)(alteration in original). Under New York law, to succeed on the claim, Plaintiff must show "(1) business relations with a third party; (2) [*101] defendants' interference with those business relations; (3) defendants acted with the sole purpose of harming the plaintiff or used dishonest, unfair, or improper means; and (4) injury to the relationship." Purgess v. Sharrock, 33 F.3d 134, 141 (2d Cir. 1994)(citation omitted); accord PPX Enters. v. Audiofidelity Enters., Inc., 818 F.2d 266, 269 (2d Cir. 1987). This Court finds that Plaintiff has set forth a satisfactory claim to warrant further discovery on this issue.

To establish a successful claim, Plaintiff "'must specify some particular, existing business relationship through which

plaintiff would have done business but for the allegedly tortious behavior.'" Minnesota Mining and Mfg. Co. v. Graham-Field, Inc., 1997 U.S. Dist. LEXIS 4457, No. 96 Civ. 3839, 1997 WL 166497, at *7 (S.D.N.Y. April 9, 1997)(quoting Kramer v. Pollock-Krasner Found., 890 F. Supp. 250, 258 (S.D.N.Y. 1995)); see also Envirosource, Inc. v. Horsehead Resource Dev. Co., 1996 U.S. Dist. LEXIS 9099, No. 95 Civ. 5106, 1996 WL 363091, at *14 (S.D.N.Y. July 1, 1996)(quoting McGill v. Parker, 179 A.D.2d 98, 582 N.Y.S.2d 91, 95 (App. Div. 1st Dep't 1992))("A 'general [*102] allegation of interference with customers without any sufficiently particular allegation of interference with a specific contract or business relationship' will not withstand a motion to dismiss."). Because of the nature of this tort, it is axiomatic that the selected business relationships need not have amounted to an actual contract. See Volvo, 857 F.2d at 74.

Despite the high burden of proof that Plaintiff will ultimately need to satisfy for the claim, at this point in the action, Rule 8(a) requires only that Plaintiff allege "a short and concise statement, detailed only to the extent necessary to enable defendant[s] to respond." Geisler, 616 F.2d at 640 (citing Fed. R. Civ. P. 8). The amended complaint "complies with this standard because it identifies the prospective business relationships as being with [owners of movie rights and distributors of films], such that it does not appear 'beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief.'" SLM, Inc. v. Shelbud Prods. Corp., 1993 U.S. Dist. LEXIS 5171, No. 92 Civ. 3073, 193 WL 127969, at *5 (S.D.N.Y. April 20, 1993)(quoting Conley, 355 U.S. at 45-46). [*103]

In any event, Plaintiff has already identified in the amended complaint certain pre-contractual relationships with which Defendants interfered. For example, at PP 55-57 of the amended complaint, Plaintiff recites the steps it took to

attempt to re-release Belle. See Amended Compl. Specifically, Solow enlisted Defendant Brueggemann, its agent, to investigate the possibility of leasing the film. See id. at P 55. After some inquiries, Defendant Brueggemann informed Solow that the owners of the rights to Belle were interested only in selling. See id. at P 56 Solow then instructed Brueggemann to pursue purchasing the movie. See id. Plaintiff asserts that instead, Brueggemann presented the idea of buying Belle to Miramax, which, thereafter, purchased and re-released the picture with great success. See id. at P 57.

Based on these facts, it is at least arguable that Plaintiff had entered into negotiations with the owners of the rights to Belle. "Interference with a plaintiff's business relations with a third party can be found if the plaintiff had a 'reasonable expectancy of a contract' with the third party, which can [*104] result from 'mere negotiations.'" Strapex Corp. v. Metaverpa N.V., 607 F. Supp. 1047, 1050 (S.D.N.Y. 1985)(quoting Morse v. Swank, Inc., 459 F. Supp. 660, 667 (S.D.N.Y. 1978)). Here, the owners of Belle were certainly inclined to sell the rights to the film, as evidenced by their sale to Miramax. At this point, therefore, it is reasonable to infer that but for Defendant Brueggemann's interference, Plaintiff would have been able to acquire the rights to Belle and would have been able to acquire the rights to Belle and would have realized the substantial profits that Miramax enjoyed in its place.

Additionally, at P 67 of the amended complaint, Plaintiff states that "Sony intentionally induced the distributor Warner Pictures . . . to decide not to continue to exhibit Anna Karenina at the Paris Theatre, as previously arranged, and instead to move it to the Sony Tower East theatre." Amended Compl. Considering that Anna had already been playing at the Paris, any interruption with the exhibition of Anna that Defendants caused would be interference with an existing

business relationship. At this juncture in the litigation, it is tenable [*105] that but for Defendants' interference Plaintiff could have negotiated to continue to show Anna at the Paris and realize greater profits. [47]

Furthermore, Plaintiff has sufficiently alleged the element of the tort requiring that Defendants "acted with the sole purpose of harming the plaintiff or used dishonest, unfair, or improper means." Purgess, 33 F.3d at 141 [*106] (emphasis added). It is well settled that a defendant's "status as a competitor . . . may excuse him from the consequences of interference with prospective contractual relationships, where the interference is intended at least in part to advance the competing interest of the interferer, no unlawful restraint of trade is effected, and the means employed are not wrongful." Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 N.Y.2d 183, 191, 428 N.Y.S.2d 628, 406 N.E.2d 445 (1980); see also PPX, 818 F.2d at 269 ("If defendant's interference is intended, at least in part, to advance its own competing interests, the claim will fail unless the means employed include criminal or fraudulent conduct."); Imtrac Indus., Inc. v. Glassexport Co. Ltd., 1996 U.S. Dist. LEXIS 1022, *35-36, No. 90 Civ. 6058, 1996 WL 39294, at *11 (S.D.N.Y. Feb. 1, 1996)("In the context of tortious interference with prospective business relations, self-interest can operate to nullify the claim itself.").

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[47] It is also possible that Plaintiff once again has mislabeled its claim against Defendants. Plaintiff contends that Defendants interfered with the exhibition of Anna at the Paris "as previously arranged," suggesting there was already an agreement between Plaintiff and Warner for the showing of Anna. If so, Defendants' purported interference would be not with a prospective contractual relationship but, rather, with an established contractual relation, implicating an entirely different tort. See Martin Ice Cream, 554 F. Supp. at 945. This Court directs Plaintiff to be more precise with regard to this matter in its future submissions.

Here, however, Defendants are not only Plaintiff's competitors in the movie exhibition business. More significantly, with regard to the prospective business relations at issue, Defendants were also [*107] Plaintiff's agent. Thus, Defendants owed Plaintiff a fiduciary duty and were, thereby, required to act in Plaintiff's best interests. It, therefore, would be a violation of fiduciary duty for Defendants to divert a lucrative business opportunity, such as the re-release of Belle, away from Plaintiff or to encourage a distributor not to continue the exhibition of its film at Plaintiff's theatre.

Additionally, Defendants' alleged competitor status would protect them only if "no unlawful restraint of trade [were] effected" by their conduct. Guard-Life, 50 N.Y.2d at 191; accord Martin Ice Cream, 554 F. Supp. at 946 (holding that actions that unreasonably restrain trade or attempts to monopolize trade "would constitute improper means"). Accordingly, "if [Plaintiff] is able to prove . . . antitrust violations . . . it will also be able to prove improper means." Martin Ice Cream, 554 F. Supp. at 946. In this case, Plaintiff has already offered a factual basis for antitrust claims against Defendants. This Court, therefore, finds that the facts adequately set forth allegations demonstrating that Defendants tortiously interfered with [*108] Plaintiff's pre-contractual relations while employing dishonest, unfair, and improper tactics. Plaintiff may use discovery to identify the specific relations at issue and gather further information to support its claim. [48]

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[48] This Court, however, cautions Plaintiff to be thorough in its research and to offer only specific contractual relations that realistically could be used to establish a claim for tortious interference. In its opposition memorandum to this Court, Plaintiff suggests that 'Defendants' failure to disclose to Plaintiff the availability of The Spitfire Grill, a Columbia film, for exhibition at the Paris could be a viable

(continued...)

[*109]

B. Breach of Fiduciary Duty

Plaintiff asserts that Defendants breached their fiduciary duties as Plaintiff's agent with respect to the operation and management of Plaintiff's theatres. See Amended Compl. at PP 95-100. For these alleged breaches of fiduciary duty, Plaintiff seeks an unspecified amount of damages and punitive damages of at least $ 100 million. See id. at P 99. Defendants respond that an exculpatory clause in the Twin Agreement expressly states that Plaintiff is prevented from bringing an action for damages based on breaches of fiduciary duty. The Twin Agreement discusses Sony's fiduciary obligation to Plaintiff and provides that Plaintiff's "sole remedy for any violation of [Sony's] obligations under this Section shall be to terminate this Agreement and [Plaintiff] shall not assert any claim for damages for any such violation." Twin Agreement at § 5.09.

While courts generally recognize exculpatory clauses, Defendants blatantly disregard well-settled case law holding that contractual terms exempting a party from liability for

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(...continued)
business relationship with which Defendants interfered. See Plaintiff's Mem. at 30 (citing Amended Compl. at P 62).

Arguing that this allegation supports a claim for tortious interference with a prospective economic advantage is extremely tenuous. If, as Plaintiff states, Defendants never informed Plaintiff of the opportunity to exhibit The Spitfire Grill, then Plaintiff is effectively asking this Court to find tortious interference with a future economic advantage of which Plaintiff was not even aware. See Minnesota Mining, 1997 WL 166497, at *7 (requiring a plaintiff to identify "some particular, existing business relationship"). The law was not intended to protect a party from such a contorted interpretation of the tort.

harm caused intentionally or willfully is wholly unenforceable. The New York Court of Appeals stated:

> An exculpatory agreement, [*110] no matter how flat and unqualified its terms, will not exonerate a party from liability under all circumstances. Under announced public policy, it will not apply to exemption of willful or grossly negligent acts. More pointedly, an exculpatory clause is unenforceable when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing.

Kalisch-Jarcho, Inc. v. City of New York, 58 N.Y.2d 377, 384-85, 461 N.Y.S.2d 746, 448 N.E.2d 413 (1983)(citations omitted); see also McNally Wellman Co. v. New York State Elec. & Gas, 63 F.3d 1188, 1198 (2d Cir. 1995); Petrocelli Elec. Co., Inc. v. Crow Constr. Co., 1999 U.S. Dist. LEXIS 15547, No. 93 Civ. 8387, 1999 WL 791683, at *6 (S.D.N.Y. October 5, 1999); Federal Ins. Co. v. Honeywell, Inc., 641 F. Supp. 1560, 1562 (S.D.N.Y. 1986); Metropolitan Life Ins. Co. v. Noble Lowndes Int'l, Inc., 192 A.D.2d 83, 600 N.Y.S.2d 212, 215 (App. Div. 1st Dep't 1993); Great N. Assocs., Inc. v. Continental Casualty Co., 192 A.D.2d 976, 596 N.Y.S.2d 938, 940 (App. Div. 3d Dep't 1993). This public policy is so central [*111] to adjudicating contractual relationships that even if the parties to an exculpatory clause contemplated that the violating conduct would be incorporated within the purview of the exempting language, the clause would still be unenforceable. See Kalisch-Jarcho, 58 N.Y.2d at 385; Great N. Assocs., 596 N.Y.S.2d at 940. Here, Plaintiff argues that Defendants "intentionally, willfully, and maliciously" acted to destroy Plaintiff's ability

to compete in the movie industry and maintains that it will be able to prove [49] such grossly negligent conduct through discovery. If Plaintiff can indeed support such claims, this Court will not permit Defendants to evade monetary liability for their purported breaches of fiduciary duty by relying on the unenforceable exculpatory clause contained in § 5.09 of the Twin Agreement.

[*112]

VII. Allegations against the Sony Corporate Entities and the Individual Defendants

In addition to alleging claims against Sony, Plaintiff brings its claims against the Sony Corporate Entities and the Individual Defendants. Defendants argue that Plaintiff has not identified sufficient allegations to sustain any of its claims against either the Sony Corporate Entities or the Individual Defendants. This Court, however, finds that Defendants' objections ultimately go to Plaintiff's future burden of proving its claims rather than to its present burden of pleading. Accordingly, this Court refuses to dismiss any of the claims against these defendants.

A. Sony Corporate Entities

Plaintiff alleges that the Sony Corporate Entities own, dominate, and control Sony and "condoned, and benefitted from the violations alleged [in the amended complaint]." Id. at P 21. With respect to the asserted violations, Plaintiff contends that "all of the defendant corporations effectively operated as a single . . . entity." Id. Specifically, Plaintiff

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[49] "I just wanna prove somethin'--I ain't no bum from the neighborhood. It don't matter if I lose . . . don't matter if he opens my head . . . . The only thing I wanna do is go the distance. That's all." Rocky (United Artists 1976).

states that at the opening of the Lincoln Square theatre, the President and CEO of Defendant Sony Electronics gave a speech in which he commended [*113] the former Chairman and CEO of Defendant Sony Pictures for having "the vision[50] to create the concept" for the Lincoln Square theatres. Id. Additionally, Plaintiff claims that it wrote to all of the Sony Defendants regarding their conduct toward Plaintiff's theatres and maintains that the Sony Defendants collectively refused to rectify the situation. See id. In that regard, Plaintiff asserts:

> Officers of Sony Theatres consulted with officers of Sony Pictures concerning defendants' conduct in relation to plaintiff, as reflected by the practice of Sony Theatres officers in providing officers of Sony Pictures with copies of correspondence addressing the matters alleged [in the amended complaint]. Officers of Sony [Electronics] and Sony Corporation received and responded to correspondence concerning these disputes, ratifying the violations by the other defendants. For example, after receiving a September 11, 1996 letter from Solow writing on behalf of plaintiff concerning the situation, Nobuyuki Idei, President of Sony Corporation, instructed Ted Kawai, Deputy President of Sony [Electronics], to investigate and respond to plaintiff's concerns. Officers of Sony [Electronics], [*114] Sony Pictures and Sony Theatres thereafter coordinated their responses . . . . At each stage of this process, Mr. Kawai of Sony [Electronics] reported to Mr. Idei

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[50] "Don't you eyeball me boy! Use your peripheral vision." Officer and a Gentleman (Paramount 1982).

> of Sony Corporation and consulted closely with officers of Sony Pictures and Sony Theatres.

Id. at P 22.

Defendants would like this Court to find that the Sony Corporate Entities had no role in exhibiting movies at Plaintiff's theatres and, therefore, Plaintiff cannot support any of its claims against them. Defendants argue that the Sony Corporate Entities' contacts with Defendant Sony involved nothing more than general consultation between parent corporations and their subsidiary, acceptable conduct that does not implicate the antitrust laws. See Reisner v. General Motors Corp., 511 F. Supp. 1167, 1173 (S.D.N.Y. 1981)("A parent corporation and its subsidiary must be able to consult on some matters of company policy without [*115] violating the antitrust laws absent a demonstration of anticompetitive motivation.")(citation omitted), aff'd, 671 F.2d 91 (2d Cir. 1982). This Court, however, forcefully rejects Defendants' suggestion that the facts Plaintiff alleged against the Sony Corporate Entities demonstrate only nominal consultation.

The purported control that Plaintiff attributes to the Sony Corporate Entities helps validate Plaintiff's contention that the Sony Corporate Entities dominated and controlled Sony's actions with respect to Sony's operation of Plaintiff's theatres. From Plaintiff's allegations, it is reasonable for this Court to find that Sony's allegedly improper actions toward Plaintiff were taken pursuant to directions it received from its parent organizations, the Sony Corporate Entities. [51] First,

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[51] Indeed, the Supreme Court has recognized the "unity of purpose or a common design" that exists between parents and subsidiaries of the same company, finding that parent and subsidiary companies are not legally capable of conspiring with one another under § 1. Copperweld

(continued...)

Plaintiff asserts that the President of Sony Corporation, Sony's ultimate parent company, instructed the Deputy President of Sony Electronics, the immediate parent company of Sony Pictures, "to investigate and respond to plaintiff's concerns," and that the Deputy President of Sony Electronics, thereafter, "consulted closely with officers of Sony Pictures and Sony Theatres" and continuously [*116] reported back to the President of Sony Corporation. Amended Compl. at P 22. The allegations suggest a top-down coordinated effort on behalf on the entire Sony corporation against Plaintiff. Such an effort, if proven, would constitute extensive involvement, going beyond simple consultation and into the realm of "anti-competitive motivation." See Reisner, 511 F. Supp. at 1173; see also Baratta v. Kozlowski, 94 A.D.2d 454, 464 N.Y.S.2d 803, 805 (App Div. 2d Dep't 1983)(dismissing claims against parent company because "complaint failed to allege that it exercised complete domination and control over the subsidiary"). Second, if the Sony Corporate Entities are truly as uninvolved with film exhibition as Defendants would

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(...continued)
Corp. v. Independence Tube Corp., 467 U.S. 752, 753, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984). The Court stated:

> The coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise . . . . A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate, and their general corporate objectives are guided or determined not by two separate corporate consciousnesses, but one. With or without a formal "agreement," the subsidiary acts for the parent's benefit. If the parent and the subsidiary "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests . . . .

Id.

want this Court to find, it is curious that at the opening of the Lincoln Square theatres, which presumably Defendant Sony operates as exhibitors, the President and CEO of Sony Electronics praised the former Chairman and CEO of Sony Pictures for his insight to develop the complex. See Amended Comp. at P 21. [52] Third, this Court has already noted that the Sony Corporate Entities are proper defendants with regard to Plaintiff's § 1 [*117] block-booking claim. See supra part V.A.1. Thus, this Court considers the factual allegations more than sufficient to allow Plaintiff to go forward with its claims against the Sony Corporate Entities.

[*118]

B. Individual Defendants

Plaintiff asserts that the Individual Defendants have "with malice toward plaintiff, personally engaged and participated in the antitrust, contract, tort and fiduciary violations described [in the amended complaint] and have controlled, directed, authorized and ratified the violations committed by Sony." Amended Compl. at P 19. Pursuant to this alleged involvement, Plaintiff argues that this Court should hold the Individual Defendants personally liable for Plaintiff's injuries. See id. Defendants, however, maintain that the amended complaint fails to include adequate facts to sustain either the federal or state claims against them. See Defendants' Mem. at 28-30; Reply Mem. at 15-22.

This Court finds that Plaintiff has satisfactorily [*119] plead antitrust allegations against the Individual Defendants.

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[52] It is also interesting that a senior officer of Sony Pictures provided the initial motivation behind the construction of the Lincoln Square complex. In the context of this case, such influence on behalf of Sony Pictures, a distributor, can be understood as a desire for Sony Pictures to have a large, ready outlet for its films.

A corporate officer or director can be held personally liable for damages arising from an antitrust violation where he or she participated in the unlawful acts, or where he or she acquiesced or ratified the actions of other officers or agents of the corporation who violated the antitrust laws. Hoffman Motors Corp. v. Alfa Romeo, 244 F. Supp. 70, 82 (S.D.N.Y. 1965); Cott Beverage Corp. v. Canada Dry Ginger Ale, Inc., 146 F. Supp. 300, 301-02 (S.D.N.Y. 1956). Accordingly, the extent to which the Individual Defendants were involved with the alleged antitrust violations is an important fact for this Court to consider. See Continental Orthopedic Appliances, Inc. v. Health Ins. Plan of Greater N.Y., Inc., 994 F. Supp. 133, 142 (E.D.N.Y. 1998); New York v. Cedar Park Concrete Corp., 665 F. Supp. 238, 247 (S.D.N.Y. 1987). Here, Plaintiff argues that this Court should hold the Individual Defendants, all of whom are major employees, personally liable for the purported antitrust violations because of the influence they exerted in effectuating Sony's corporate policy. [*120] This Court finds that such an allegation meets the pleading requirement of Rule 8(a).

With regard to the state claims, this Court dismisses Plaintiff's contract claim against the Individual Defendants. Under New York law, "a corporate officer cannot be held liable for a corporation's breach of contract claims." Komatsu Invs., Ltd. v. Greater China Corp., 1997 U.S. Dist. LEXIS 310, No. 96 Civ. 3833, 1997 WL 16667, at *2 (S.D.N.Y. Jan. 17, 1997); accord Hudson Venture Partners, L.P. v. Patriot Aviation Group, Inc., 1999 U.S. Dist. LEXIS 1518, No. 98 Civ. 4132, 1999 WL 76803, at *6 (S.D.N.Y. Feb. 17, 1999); Cruz v. Nynex Info. Resources, 263 A.D.2d 285, 2000 N.Y. App. Div. LEXIS 1294, 2000 WL 150864, 703 N.Y.S.2d 103, at *6 (N.Y. App. Div. 1st Dep't 2000). Even if a corporate individual's actions caused a breach of a corporation's contractual obligations, such conduct does not

render the individual personally liable. See Cruz, 2000 WL 150864 at *6.

Indeed, Plaintiff effectively concedes this point. In its opposition memorandum to this Court, Plaintiff attempts to clarify its position, explaining that it "seeks to hold the individual defendants liable in tort for their direct participation in the antitrust violations, the breach [*121] of fiduciary duties owed to Plaintiff, and the tortious interference with Plaintiff's business relationships . . . recognizing the distinction between officers' liability on their corporation's contracts, and their liability for their own torts, even those committed in the course of their employment." Plaintiff's Mem. at 37 (citing Komatsu, 1997 WL 16667, at *2).

Plaintiff, thereby, has indicated its intention to assert against the Individual Defendants only those state claims that lie in tort. Because a court may ordinarily hold an individual corporate officer personally liable for participation in the commission of a tort, even one arising out of his or her duties for the corporation, see Lopresti v. Terwilliger, 126 F.3d 34, 42 (2d Cir. 1997); Komatsu, 1997 WL 16667, at *2; National Survival Game, Inc. v. Skirmish, U.S.A., Inc., 603 F. Supp. 339, 341 (S.D.N.Y. 1985); Key Bank of N.Y. v. Grossi, 227 A.D.2d 841, 642 N.Y.S.2d 403, 404 (App. Div. 3d Dep't 1996), this Court permits Plaintiff to go forward against the Individual Defendants with the claims for breach of fiduciary duty [53] and tortious [*122] interference with prospective

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[53] Defendants argue that the amended complaint never identifies facts from which this Court can conclude that a fiduciary relationship had been established between Plaintiff and the Individual Defendants. See Defendants' Mem. at 29; Reply Mem. at 20. Such a contention is meritless. Besides § 5.09 of the Twin Agreement, which establishes, in writing, a fiduciary relationship between Sony's executives and Plaintiff,

(continued...)

business relations. Alleging that the Individual Defendants have personally participated in and exercised dominion and control over the tort and fiduciary violations described in the amended complaint is a short, plain statement of the claims that satisfies Rule 8(a).

Thus, Plaintiff's assertions against the Individual Defendants provide grounds for Plaintiff to proceed with discovery to identify particular instances [*123] where the Individual Defendants actively participated in the antitrust and tort violations. [54] Indeed, Plaintiff has already specified

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(...continued)
the Individual Defendants owed fiduciary duties to Plaintiff by the very fact that they served as Plaintiff's agents in the operation of its theatres.

[54] To bolster their contention that this Court should dismiss the antitrust claims against the Individual Defendants, Defendants cite Brown v. Donco Enters., Inc. 783 F.2d 644 (6th Cir. 1986), a Sixth Circuit case that states:

> Individual liability under the antitrust laws can be imposed only where corporate agents are actively and knowingly engaged in a scheme designed to achieve anticompetitive ends. To support a determination of liability under this standard, the evidence must demonstrate that a defendant exerted his influence so as to shape corporate intentions.

Id. at 646. First, the Sixth Circuit case is not binding here. See Newsweek, 663 F.2d at 1196. Second, even the Sixth Circuit acknowledged the paucity of support for the above proposition, stating "at the outset, the court recognizes that the conduct proscribed by the antitrust laws is often difficult to distinguish 'from the gray zone of socially acceptable and economically justifiable business conduct,'" and citing only "one court," from the Northern District of California, in a 1979 decision. Id. In addition to the lack of precedential value that the Sixth Circuit case has for this Court, this Court finds that, in any event, Plaintiff has complied with the Sixth Circuit standard for purposes of withstanding a motion to dismiss.

certain actions by the Individual Defendants that raise the specter of antitrust and tort violations against Plaintiff. See, e.g., Amended Compl. at PP 55-57, 59, 66, 79-81, 83-84.

[*124]

Conclusion

Granting a motion to dismiss is a blunt weapon and a drastic remedy that a court should employ only after careful consideration of all the salient issues leads to the conclusion that no interpretation of facts could support a plaintiff's claims. Sustaining a motion to dismiss is particularly difficult for a defendant in a case involving antitrust claims, where a court's wariness of dismissal is heightened. This Court has pored over the allegations in the amended complaint and the parties' submissions in view of the relevant case law. This Court finds that Plaintiff has sufficiently alleged in its amended complaint its federal and state claims against all of the Defendants with the exception of Plaintiff's contract claim against the Individual Defendants. Therefore, this Court refuses to dismiss the amended complaint at this juncture in the litigation. The parties should proceed with discovery on the remaining issues. [55] Accordingly,

[*125]

IT IS HEREBY ORDERED THAT Defendants' Motion to Dismiss is GRANTED with regard to Plaintiff's breach of contract claim against the Individual Defendants. [56]

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[55] "May the force be with you." Star Wars (20th Century Fox 1977).

[56] In the amended complaint, Plaintiff alleges breaches of the Twin Agreement, the Paris Agreement, and the Festival Agreement. See Amended Compl. at PP 86-94. This Court directs Plaintiff in its future submissions related to its contract claims against Defendants to detail the

(continued...)

IT IS FURTHER ORDERED THAT Defendants' Motion to Dismiss is DENIED in all other respects.

The End.

MM

SO ORDERED.

Dated: March 8, 2000

New York, New York

David N. Edelstein
U.S.D.J.

(...continued)
arrangements governing the Paris and Festival contracts, as the amended complaint fails to delineate the specifics of either.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed June 22, 2005]

04-2419-cv

SIX WEST RETAIL v. SONY THEATRE

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 22nd day of June two thousand five.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Six West Retail Acquisition, Inc. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: /s/
Motion Staff Attorney

APPENDIX E

Plaintiff Deposition Exhibit 46
January 18, 1996 Letter from Travis Reid to Sheldon Solow

SONY

Sony Theatres

SONY THEATRES
a SONY PICTURES ENTERTAINMENT company

TRAVIS REID
Executive
Vice President

January 18, 1996

Mr. Sheldon Solow
9 West 57th Street
New York, New York 10019

Dear Sheldon,

As you mention in your letter, we have indeed discussed in the past Sony Entertainment releases which are being exhibited on the east side of New York by Cineplex or United Artists Theatres. As I have previously explained, Sony Pictures Distribution and Sony Theatres operate as two separate entities that enjoy a mutually beneficial but non-exclusive relationship.

The east side of New York is one of seven primary film zones in Manhattan, meaning there are potentially seven different theatres in Manhattan playing any given

picture. The theatre playing the picture in one zone, i.e. Lincoln Square on the west side of New York, does not generally have any connection with which theatre exhibits the same picture in a different zone. The east side has become Manhattan's most competitive zone, with four different exhibitors booking 26 screens, three of which are operated by Sony Theatres. Our arrangements in this zone are with Paramount, Warner Brothers, and Gramercy Pictures.

Please keep in mind that if we were to decide to attempt to change our relationships on the east side of New York this business does not work in such a way that we would only play "Sense and Sensibility", but that we would become obligated to play a full portion of the Sony Pictures release schedule.

Sincerely,

/s/ Travis Reid

cc: Jim Loeks
Barrie Lawson Loeks

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